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ABSTRACT

The Law Division section of the proceedings contains the following seven papers: "Silencing Foreign Voices: Restrictions on Alien Ownership of Broadcast Stations" (James V. D'Aleo); "The First Amendment & Postmodern Tendencies in Cyberspace" (Justin Brown); "Contracting the News: A Study of Online News User Agreements" (Victoria Smith Ekstrand); "Libel in 48 Point: How Courts Have Ruled Since 'Sullivan' on Allegedly False and Defamatory Headlines Atop Accurate Stories" (Susan Keith); "Hands in the 'Cookie' Jar: Disclosure of Internet Transaction Generated Information Under State Public Records Laws" (Harlen Makemson); "The Malice Muddle: The Changing Definition of Malice and Its Threat to the Fair Report Privilege" (Deborah Gump); and "Tainted Sources, Matters of Public Concern: Applying the Wiretapping Laws to Media Disclosures" (Josie Tullos). (RS)

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# Silencing Foreign Voices:
# Restrictions on Alien Ownership of Broadcast Stations

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# Silencing Foreign Voices: Restrictions on Alien Ownership of Broadcast Stations

### By James V. D'Aleo

Broadcast ownership provisions have been present in American society in some form or another since 1912. The time has come for these restrictions to be lifted. The current provisions have been in place, with little variation, since the Communications Act of 1934. This paper argues that the original reasoning for these provisions no longer hold true in today's society, indicating that foreign ownership restrictions should be lifted or relaxed.

On March 2, 1999, Rep. Cliff Stearns (R-Fla.) introduced bill H.R. 942, titled "Broadcast Ownership for the 21st Century Act," in the House of Representatives. Referred to the Subcommittee on Telecommunications, Trade and Consumer Protection, the bill would reduce the number of restrictions on broadcast ownership. Specifically addressing the issue of foreign ownership in one of the sections, the bill proposes raising the maximum percentage a foreign corporation or individual can own of a U.S. broadcast property, provided certain conditions are met. In introducing the bill before the House, Stearns cited his reason for the measure: "Mr. Speaker, many nations prevent American companies from owning any percentage of their domestic broadcast industry. We must institute reciprocity and this bill starts this process now."[1]

Section 5 of Stearns' bill adds to the provisions of Section 310(b) of Title 47 of the U.S. Code dealing with foreign ownership. Parts of Section 310 date as far back as the Radio Act of 1912[2] and were most recently amended by the Telecommunications Act of 1996.[3] Section 310(b) states that a broadcast license will not be granted to an alien, a foreign corporation, or a corporation more than 20 percent of which is foreign owned.[4] In addition, a corporation owned by a holding company that has more than 25 percent foreign ownership can be refused a license if the Federal Communications Commission

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[1] 145 Cong. Rec. H833 (daily ed. Mar. 2, 1999).

[2] Krista Schwarting Rose, *Changing Frequencies: The Federal Communications Commission Globalizes the Telecommunications Industry with the Adoption of the WTO Agreement*, 8 Minn. J. Global Trade 161, 162. (1999).

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, § 403(k), 110 Stat. 56, 131-32 (1996), *reprinted in* 1 Telecommunications Act of 1996 P.L. No. 104-104: A Legislative History, at Doc. No. 1 (1997).

[4] 47 U.S.C. § 310(b) (1998)

(FCC) finds the public interest will be served by the refusal.[5] Stearns' bill would add another provision to the law, making it the policy of the United States to treat a foreign entity trying to purchase American broadcast properties in the same way that its home country treats American companies seeking to enter its broadcast industry.[6]

Should this bill become law in its present form, it would provide a marked change in the way the United States regulates broadcast ownership. Only one time in the FCC's 65-year history has that organization allowed a foreign company to breach one of the ownership benchmarks in an American broadcast property.[7] Under the Stearns proposal, a foreign individual or corporation could own as much as 40 percent of an American broadcast property, either directly or through a holding company.[8] In addition, the bill seems to suggest that the FCC would have the discretion to approve a license for a company that surpassed the 40 percent foreign ownership benchmark.[9] The implication is that the FCC would not necessarily have to automatically refuse a license to those companies with direct foreign ownership over 20 percent, increasing the Commission's discretionary power from just indirect holdings to direct holdings as well.[10]

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[5] *Id.*

[6] H.R. 942, § 5(b)(2) (1999). Thus far, only one day of hearings has been held by the subcommittee and only one speaker has addressed the Section 310(b) implications specifically. See, *Broadcast Ownership Regulations: Hearing Before the Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce*, 106th Cong. 65-69 (1999) (prepared statement of Leonard J. Asper, Chief Operating Officer, CanWest Global Communications Corporation).

[7] *In re Application of Fox Television Stations, Inc. For Renewal of License of Station WNYW-TV New York, New York*, 10 F.C.C.R. 8452, 8529 (1995) (Quello concurring). (Hereinafter referred to as Fox I). *In re Application of Fox Television Stations, Inc. For Renewal of License of Station WNYW-TV, New York, New York*, 11 F.C.C.R. 5714, 5715 (1995). (Hereinafter referred to as Fox II). One author wrote that since it is unlikely a foreign company would ever gain such a sizable foothold in American broadcasting before a question of ownership arises, the Fox precedent becomes almost irrelevant. See, W. Scott Hastings, *Foreign Ownership of Broadcasting: The Telecommunications Act of 1996 and Beyond*, 29 Vand. J. Transnat'l L. 817, 835 (1996).

[8] H.R. 942, *supra* note 6.

[9] *Id.*

Whether or not H.R. 942 becomes law, the broadcast industry has changed drastically since the Communications Act of 1934 was first passed, creating the FCC and the indirect ownership restrictions. Telephone companies have merged into multinational corporations, creating situations in which partial owners of a single company could be from several different countries. Furthermore, the communication boundaries between countries have been almost erased with the advent of direct satellites and the Internet. The FCC has already made some concessions to this new environment by allowing mergers between large, international telephone companies, which the Communications Act refers to as common carriers.[11] The purpose of this paper is to determine whether this new environment also necessitates a change in the ownership restrictions governing broadcast properties.

### *Background*

With minor changes over the years, the foreign ownership restrictions on broadcast licenses have remained basically the same since the Communications Act of 1934 created the FCC. The restrictions themselves came almost completely from Section 12 of the Radio Act of 1927,[12] which itself was a continuation of restrictions dating back to 1912.[13] The Radio Act of 1927 disallowed ownership by an alien, foreign government (the current Section 310(a)), or any company that had 20 percent foreign ownership.[14] In order to close a loophole in that law, the 1934 Act added a provision that allowed the FCC to prevent a company owned by a holding company with 25 percent foreign ownership from obtaining a license if the Commission found the public interest would be served by the denial.[15] These restrictions have remained in place for the past 65 years with only minor variations, the most recent of which came in 1996 when the Telecommunications Act removed a provision prohibiting a license-holder or holding company from having alien directors.[16]

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[10] Rahul Kapoor, *Limits on Foreign Ownership of Radio Licenses Under 47 U.S.C. §310: An Analysis of the Existing Restrictions and Proposed Changes in the Telecommunications Act of 1996*, 15 Wis. Int'l L.J. 163, 169 (1996).

[11] Schwarting Rose, *supra* note 2, at 175-179. Rose discusses some of these mergers, pointing out that the FCC wasn't as concerned with foreign influence as it was with the effect on consumers.

[12] H.R. REP. NO. 1918, at 48 (1934), *reprinted in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 733, 780 (1989).

Stearns' bill would not change these provisions, only add to them. The new section, titled "Reciprocal Treatment for Broadcast Stations," states that if a foreign country allows U.S. companies to own a minimum of 20 percent directly, or 25 percent indirectly, of a broadcast company in that country, then the U.S. government would permit corporations or individuals from that country to own the same percentage, up to 40 percent, of an American broadcasting company.[17] Congress has considered this theory of reciprocity before. Both the House and Senate agreed to use reciprocity as a basis to lift the foreign ownership restrictions on common carriers in 1995 but could not agree on the enforcement method, forcing removal of that provision from the Telecommunications Act on 1996.[18]

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[13] Schwarting Rose, *supra* note 2, at 162.

[14] *Id.*

[15] H.R. REP. NO. 1918, *supra* note 12, at 48-49.

[16] TELECOMMUNICATIONS ACT OF 1996, *supra* note 3, at § 403(k)(1).

[17] H.R. 942, *supra* note 6.

Also, critical to the issue of foreign ownership is a concept known as economic competitive opportunity (ECO), which is a four-part test used to determine if American companies have an opportunity to compete in foreign countries. Unlike ECO and the plan created by the World Trade Organization (WTO), both of which left broadcasting out of the framework, Stearns' bill would open broadcast ownership in the same way as the common carrier industry.

ECO, followed by the WTO Agreement, has made it possible for the United States to allow foreign companies into the U.S. common carrier market with some protection against another country taking advantage of the provisions. The ECO test, which the FCC adopted in November 1995, consists of four parts: the legal right for U.S. companies to "obtain a controlling interest in a facilities-based carrier," nondiscriminatory interconnection, competitive safeguards against anticompetitive practices and a regulatory framework of enforcement.[19] Even though the FCC was willing to use this analysis for common carriers, the Commission expressly stated that it was not willing to use it for broadcasting.[20]

While the FCC was using this test on a case-by-case basis, the WTO agreement put more of a multinational framework to that analysis. Signed by 69 countries in 1997 and taking effect in 1998, the agreement had the United States presume that the public interest is served by having a company from a WTO signatory enter the U.S. market[21] while maintaining the ECO test for all non-WTO countries.[22] Neither the United States nor many of the other signatories wanted to include broadcasting in the agreement.[23]

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[18] 142 CONG. REC. S689 (daily ed. Feb. 1, 1996) (Telecommunications Bill Resolved Issues, placed into record), *reprinted in* 4 TELECOMMUNICATIONS ACT OF 1996 P.L. NO. 104-104: A LEGISLATIVE HISTORY, at Doc. No. 83 (1997).

[19] *In the Matter of Market Entry and Regulation of Foreign-Affiliated Entities*, 11 F.C.C.R. 3873, 3891-3894 (1995).

[20] *Id.*, at 3946.

### *Literature Review*

The question of whether foreign individuals or entities should be allowed to invest in American broadcast properties is not the main issue in much scholarly literature. With cable, the Internet, and direct broadcast satellites transmitting content to the general populace, it is generally conceded that the ownership regulations for over-the-air television and radio are rapidly becoming outdated. The main dispute among authors is over the best way to provide an open investment market with the benefits of an influx of foreign money and the ability to prevent certain individuals or foreign companies (such as those who may be enemies of the United States) from entering the market. Most look toward a variety of treaties or some form of international framework to act as the basis for an open American market, thereby taking a step toward an open global market, but even that is not a unanimous belief.

There are those, such as Ian M. Rose and W. Scott Hastings, who wrote that the United States should eliminate the foreign ownership restrictions altogether regardless of the policies of other countries. The two authors looked at this issue in different ways but manage to arrive at close to the same conclusion. Hastings wrote that the United States needs to take the first step in opening up the world market by removing its own restrictions on foreign ownership.[24] Acknowledging that issues of national security and territorial and cultural independence need to be balanced with the desire for free speech and economic opportunities, Hastings wrote that by modifying reciprocity, treating other countries as they treat the United States, a global market that would still allow the United States to exclude unwanted partners and retain some executive authority eventually can be created.[25] According to Hastings' thinking, creating a market like this would require the United States to unilaterally drop its own restrictions, thereby forcing other countries to open their markets in order to keep pace.[26]

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[21] *Foreign Participation in the U.S. Telecommunications Market*, 62 Fed. Reg. 64741, 64742 (1997).

[22] *Id.*

[23] Edmund L. Andrews, *68 Nations Agree to Widen Markets in Communications*, N.Y. TIMES, Feb. 16, 1996, at 1.

Rose advocated the repeal of the foreign ownership limits because he believes they are a violation of the First Amendment as a content-based regulation on speech and act as an ineffective protectionist trade policy.[27] Rose found that these limits violate the First Amendment by restricting the public's right to receive information from a certain group,[28] resident aliens' free speech rights,[29] and the free speech rights of those Americans who need foreign money to purchase broadcast outlets.[30] Rose said that the regulations' main purpose is to keep foreign voices out of the American marketplace, making the regulations a clear violation of the First Amendment.[31] He also pointed out that with new technologies like the Internet, which is just as pervasive as over-the-air broadcast and not subject to as many regulations, the broadcast restrictions don't provide the protection that would warrant discriminating against foreign speech.[32]

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[24] Hastings, *supra* note 7, at 822.

[25] *Id.* at 849-50.

[26] *Id.* at 855.

[27] Ian M. Rose, *Barring Foreigners From Our Airwaves: An Anachronistic Pothole on the Global Information Highway*, 95 Colum. L. Rev. 1188, 1190 (1995).

[28] *Id.* at 1205.

[29] *Id.* at 1207.

[30] *Id.* at 1209.

Rahul Kapoor and Vincent M. Paladini also contended foreign ownership limits should be changed, but each author suggested a different basis for new laws. A careful examination, however, shows that the differences are largely semantic. Kapoor proposed that the FCC should create a "reciprocity rating" based on a number of factors, including the ECO test.[33] With the introduction of ECO as part of reciprocity, Kapoor stated that the United States should repeal Section 310(b)(4), the indirect foreign ownership provision of the Communications Act to aid the growth of American telecommunication companies.[34] Paladini also put the ECO test into his framework, arguing that the United States should remove the restrictions on a reciprocal basis,[35] exactly what H.R. 942 proposes.

While most have said that the FCC regulations need to be improved, Kevin M. McDonald wrote that they are an effective way to achieve certain goals. McDonald, in an article discussing media regulation in the European Union, concluded that the

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[31] *Id.* at 1211.

[32] *Id.* at 1224.

[33] Kapoor, *supra* note 10, at 180-81.

[34] *Id.* at 180-82.

[35] Vincent M. Paladini, *Foreign Ownership Restrictions under Section 310(b) of the Telecommunications Act of 1996*, 14 B.U. Int'l L.J. 341, 343 (1996).

European Community (EC) should adopt restrictions like those in the United States in order to promote and protect European culture.[36] Part of the reason McDonald stated that U.S. broadcasting rules and laws are needed in Europe is that American programming is overrunning that continent and the European production companies cannot keep up.[37] The irony is that this is the same fear the United States used to propagate its own foreign ownership rules, a point that McDonald does not address.

### *Research Questions, Method, and Limitations*

As mentioned above, the purpose of this paper is to determine whether the foreign ownership restrictions of Section 310(b) have outlived their usefulness. Several questions will be addressed in making that determination. First, are the original reasons for including the foreign ownership restrictions in the Communications Act of 1934 still relevant today? To address that question, this paper will analyze congressional debates, hearings, and other documents relating to the Act, and its amendment in 1996.

Two additional questions arise from the actual enforcement of Section 310(b). Has this section been rendered meaningless by the FCC's willingness to use the public interest standard to allow telecommunications mergers that exceed the foreign ownership maximum? Is it in the public interest to allow foreign money into the American broadcast industry, much like the FCC has allowed in the telecommunications market? With the case of Twentieth Holding Corp., in which the FCC allowed the company to exceed the indirect foreign ownership benchmark with Fox Television Stations, it would seem that the FCC could use the case to move into the direction of allowing increased foreign ownership in broadcasting, if it so desired. As the only broadcast exception thus far, the Fox decision will be discussed with regard to Section 310(b), including the FCC's reason for allowing a high level of foreign ownership. Unfortunately, as the Fox decision indicates, there is not a great deal of case law on this particular subject[38] and there are apparently few foreign companies that want to invest in American broadcasting.[39]

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[36] Kevin M. McDonald, *How Would You Like Your Television: With or Without Borders and With or Without Culture—A New Approach to Media Regulation in the European Union*, 22 Fordham Int'l L.J. 1991, 1992 (1999).

[37] *Id.* at 2009.

For purposes of this paper, the only portion of Section 310 that will be discussed is subsection (b). Subsection (a) prohibits any foreign government or representative of a foreign government from holding a broadcast license.[40] This portion of the broadcast ownership regulations brings in a multitude of other issues that are beyond the scope of this paper. Arguments that may be logical in the context of a partially foreign-owned company directly or indirectly owning a portion of an American license become strained when applied to a foreign government.

### *National security and scarcity*

As mentioned above, restrictions on foreign ownership of broadcast properties have existed since 1912.[41] The Communications Act of 1934, however, created the system that governs the broadcast industry today. In a time when broadcast mainly consisted of radio and common carriers,[42] issues of national security and the scarcity of available frequencies took on a different meaning. Three foreign ownership restrictions were already in place under the Radio Act of 1927;[43] national security and scarcity pushed for the retention of these restrictions and the addition of the 25 percent indirect ownership restriction.

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[38] Fox II, *supra* note 7, at 5722.

[39] Andrews, *supra* note 23.

[40] 47 U.S.C. § 310(a) (1998)

[41] Schwarting Rose, *supra* note 2, at 162.

National security was a legitimate concern for the United States in the early days of broadcasting. The Radio Act of 1912 only said that a license could only be granted to an American citizen or corporation, a loophole that was exploited when two German nationals applied for and received a license under the name of a U.S. corporation.[44] It was this loophole and concern about the havoc that could be wrought by foreign ownership during a national emergency that were the impetus for the ownership restrictions of the Radio Act of 1927 and the Communications Act of 1934.[45]

The military, which once had asked for government control of all radio frequencies,[46] pushed Congress to keep foreign entities out of the American broadcasting industry with the 1934 Communications Act. In a letter to the chairman of the Senate Interstate Commerce Committee, the Secretary of the Navy wrote:

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[42] Study of Communications by an Interdepartmental Committee, at 1 (1934), *reprinted in* A Legislative History of the Communications Act of 1934, at 105 (1989).

[43] H.R. Rep. No. 1918, *supra* note 12, at 48.

[44] Rose, *supra* note 27, at 1194. Rose writes that the radio license was revoked during World War I as part of the presidential emergency powers written into the statute.

[45] *Id.* at 1194-95.

[46] Federal Communication Commission: Senate Hearings on S. 2910 Before the Committee on Interstate Commerce, 73rd Cong. 165-66 (1934) (Testimony of Capt. S.C. Hooper, Director of Naval Communications), *reprinted in* A Legislative History of the Communications Act of 1934, at 119, 287-88 (1989).

> In the event of war between other nations, nationally owned companies would be expected to scrupulously guard against committing an unneutral act, whereas an international company would not only lack the same incentive, but might even find it advantageous to perform unneutral service. Such stations might easily be employed in espionage work and in the dissemination of subversive propaganda....
>
> National ownership or control of communication systems will continue to exist and no other practical plan for the great nations can be forseen at the present time. Until world conditions are changed, this Department will look with apprehension upon any legislation which permits communication companies in this country to be subject to foreign influence. Such companies must of necessity include international companies.[47]

As the letter indicates, if the Navy had its way, there would have been no foreign presence of any kind in American broadcasting. The letter also states that this opinion could change as the world does, an indication that the Secretary of the Navy knew that the restrictions might not make sense once the broadcast industry grew.

Much of the Navy's concern came from the fact that the American communications industry, particularly radio stations, were expected to become part of the military communication system during a time of war.[48] Navy Captain S.C. Hooper stated that radio was the main means by which military units communicate with each other, thereby requiring commercial radio stations to augment the military's own facilities should the need arise.[49] Because the commercial radio stations would be used to aid the war effort, the military would need to train radio station personnel, disclosing confidential war plans in the process. The plans were of such a nature that they "may not be divulged to any company, or to individuals of any company regarding which the least doubt can be entertained as to the citizenship, patriotism, and loyalty of any of its officers or personnel,"[50] according to Hooper's testimony.

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[47] *Id.* at 169. The Secretary of the Navy made a similar point in a written statement to the Senate Interstate Commerce Committee on Dec. 22, 1932 in hearings on H.R. 7716, which would have amended the Radio Act of 1927. See, FEDERAL COMMUNICATION COMMISSION: HOUSE HEARINGS ON H.R. 8301 BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 73RD CONG. 54-55 (1934) (Part of written testimony of Capt. S.C. Hooper, Director of Naval Communications), *reprinted in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 343, 400-01 (1989).

[48] *Id.* at 170.

[49] *Ibid.*

In his testimony before the House Committee on Interstate and Foreign Commerce, Hooper addressed the issue of indirect ownership, stating that "if a holding company owns the subsidiary, it dominates its every act."[51] In a memorandum submitted to the committee, Hooper proposed that all radio companies transmitting in the United States should remain completely American, even to the extent of not allowing American companies to purchase foreign broadcast facilities.[52] It was his belief that

> [s]uch an international company, dependent as it must be upon the good will of foreign governments for the maintenance of its foreign holdings, could not be depended upon to forego any steps necessary to maintain such good will, even to the extent of divulging information which might be prejudicial to the nation defense of the United States.[53]

With radio still in its infancy and television nonexistent, the government's main concern was not with making sure the general public received regular broadcasts but with the military's ability to function should an emergency arise. Despite such concerns, Congress did not go overboard in writing the law. However, the Senate Committee on Interstate Commerce wrote in its report that national security objections to allowing any indirect foreign ownership were irrelevant since the President had the right to seize radio stations in a time of war.[54] To place tougher restrictions would hurt unnecessarily those American companies that had foreign connections.[55]

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[50] *Id.* at 170-71.

[51] FEDERAL COMMUNICATION COMMISSION: HOUSE HEARINGS ON H.R. 8301 BEFORE THE COMMITTEE ON INTERSTATE COMMERCE AND FOREIGN COMMERCE, 73RD CONG. 23 (1934) (Testimony of Capt. S.C. Hooper, Director of Naval Communications), *reprinted in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 343, 369 (1989).

[52] *Id.* at 52. (Hooper memorandum to House Committee on Interstate and Foreign Commerce)

[53] *Id.*

Related to the issue of national security was the scarcity of radio broadcast frequencies, a problem that would rise with the increased communication of war. The use of radio communication was becoming more prevalent in the military, despite the limited number of available frequencies.[56] As mentioned above, commercial radio stations were expected to take part in the war effort by augmenting the military systems.[57] Testifying before the House Committee on Interstate and Foreign Commerce, Maj. Roger Colton of the U.S. Army said:

> The use of radio by the Army is rapidly and steadily increasing and will continue to increase. As far as we are able to see at present there are not enough frequencies available in the entire radio spectrum to take care of the minimum needs of the Army in combat. Hence, in case of war, it appears that commercial radio communication would have to be materially curtailed, with the result that the greater part of any peace-time communications carried by radio would necessarily be transferred to the wire companies.[58]

In essence, commercial radio stations would cease functioning during a time of war and their frequencies would become property of the U.S. military. Even under the best of circumstances, this would be a difficult task. Having foreign individuals and/or companies involved could make the process much more difficult, in addition to the threat of a hostile country getting hints of the U.S. military's plans.

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[54] S. REP. NO. 781, at 7 (1934), *reprinted in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 711, 717 (1989).

[55] *Id.*

[56] *Id.* at 103 (testimony of Maj. Roger Colton, Signal Corps, United States Army).

[57] HOUSE HEARINGS ON H.R. 8301 BEFORE THE COMMITTEE ON INTERSTATE COMMERCE AND FOREIGN COMMERCE, *supra* note 51, at 52.

[58] *Id.*

*Changing Environment*

In today's environment, however, national security and spectrum scarcity are no longer overriding concerns. When Congress debated what would be the 1996 Telecommunications Act, there were over 11,000 radio stations and 1,100 broadcast television stations,[59] numbers that were expected to rise in the future.[60] With so many over-the-air stations available, in addition to those resources available through cable, satellite dishes and the Internet, there cannot be a feasible argument that a scarcity of communication resources no longer exists.

Nor is it feasible for the government to claim foreign companies entering the U.S. broadcasting industry would harm national security. The national security rationale was based on the fear that foreign countries could harm the United States militarily by owning radio stations. This concern was barely mentioned during the congressional hearings or debates on the 1996 Telecommunications Act. In only one instance was national security brought up in close to the same context as 1934. Scott Blake Harris, International Bureau Chief of the FCC, stated that the Commission considered national security as part of the public interest test, unless the Executive Branch expressed a specific concern.[61] Other than that statement, the national security issue was basically absent. Congress and its witnesses seemed more concerned about editorial control and the profitability of American telecommunication companies.

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[59] H.R. REP. NO. 104-204, at 54 (1995), *reprinted in* 1 TELECOMMUNICATIONS ACT OF 1996 P.L. NO. 104-104: A LEGISLATIVE HISTORY, at Doc. No. 3 (1997).

[60] *Id.*

[61] HEARING ON TELECOMMUNICATION POLICY REFORM: SENATE HEARING OF THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, 104TH CONG. 249 (1995) (testimony of Scott Blake Harris, Bureau Chief, International Bureau, Federal Communications Commission), *reprinted in* 2 TELECOMMUNICATIONS ACT OF 1996 P.L. NO. 104-104: A LEGISLATIVE HISTORY, at Doc. No. 8 (1997).

Issues of control over editorial content should not be factors in deciding the ownership of a broadcast property.[62] Yet when it comes to foreign companies owning a piece of an American broadcast property, content discrimination has apparently become an acceptable reason to keep them out. Larry Irving of the National Telecommunications and Information Administration told the Senate Commerce, Science and Transportation Committee, "The administration believes we should not be too hasty in lifting restrictions on the amount of foreign influence over or control of our broadcast licenses, particularly in light of the editorial discretion that we repose in broadcasters."[63] In another statement, Andrew Jay Schwartzman, Executive Director of Media Access Project, expanded on why his group opposes allowing foreign ownership in broadcasting, a line of reasoning that stands directly in line with the government's:

> Unlike other media, broadcasting stations are an integral part of the machinery of our democracy. H.R. 514 would allow foreign governments and those working in their service to endorse candidates for public office, decided who can appear on a broadcast debate and to administer candidates' access via equal time and lowest unit rate provisions of the law.[64]

Neither of these two statements seems concerned about national security in the same way as 1934; they are only concerned with the American public possibly hearing the voice of a foreign national, not even to the level of propaganda. This is not about protecting war plans; it is about keeping foreign ideas out of the American marketplace of ideas.

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[62] Rose, *supra* note 27, at 1190.

[63] HEARING ON TELECOMMUNICATIONS POLICY REFORM: SENATE HEARING OF THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, 104TH CONG. 36 (1995) (testimony of Larry Irving, National Telecommunications and Information Administration), *reprinted in* 2 TELECOMMUNICATIONS ACT OF 1996 P.L. NO. 104-104: A LEGISLATIVE HISTORY, at Doc. No. 7 (1997).

[64] COMMUNICATIONS LAW REFORM: HOUSE HEARING BEFORE THE SUBCOMMITTEE ON TELECOMMUNICATIONS AND FINANCE OF THE COMMITTEE ON COMMERCE, 104TH CONG. 417 (1995) (testimony of Andrew Jay Schwartzman, Executive Director of Media Access Project), *reprinted in* 2 TELECOMMUNICATIONS ACT OF 1996 P.L. NO. 104-104: A LEGISLATIVE HISTORY, at Doc. No. 9 (1997).

### *A foreign broadcaster enters*

For all the concerns expressed about the possible entrance of foreign money into the American broadcasting market, the FCC did not seem very concerned about allowing Fox Television Stations to become the first exception to the indirect broadcast ownership provisions. The Fox case shows how the FCC has been willing to simultaneously follow the letter of the law while also ignoring certain facts in order to facilitate an action it believes is in the public interest. At the same time, the Commission's concern about foreign influence in American broadcasting seem hypocritical in light of the reasoning it used to allow Fox to maintain a high degree of foreign equity in its ownership structure.

The FCC leadership had made it clear that creating a fourth network was a major policy objective and that Rupert Murdoch was the best individual to achieve that goal.[65] On this basis, the Commission allowed Twentieth Holdings Corp. (THC), the corporate parent of Fox Television Stations, to purchase six television stations from Metromedia in 1985, despite the fact that Murdoch was not yet a U.S. citizen, which he became several months later.[66] Under THC's ownership structure, Murdoch owned all of the company's preferred stock, which accounted for 76 percent of the company's voting shares. A subsidiary of News Corp., an Australian media company controlled by Murdoch, controlled all of the common stock, representing the other 24 percent of the voting shares.[67] The FCC gave its final approval for the transfer in 1986.[68]

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[65] Stuart Taylor, Jr., *Witch-Hunt OR Whitewash*, THE AMERICAN LAWYER, April 1995, at 60, 63.

[66] Fox I, *supra* note 7, at 8457-58

An unusual aspect of the THC ownership structure was not revealed until 1994, when Fox informed the FCC that News Corp. had provided 99 percent of the equity to purchase the television stations.[69] Even though News Corp. indirectly controlled only 24 percent of THC, the structure was found to violate FCC rules on indirect ownership. In another 1985 case, the FCC decided it would interpret "the term 'capital stock,' as it applies to non-corporate entities, to encompass the alternative means by which equity or voting interests are held in these businesses. . . .[W]e conclude that the statutory benchmarks are applicable to the partners who hold equity or voting interests in a limited partnership."[70] Because of this ruling, as the FCC would state in the Fox decision, News Corp.'s ownership percentage in THC, a holding company, exceeded the acceptable limit as set by Section 310(b)(4).[71]

The FCC's ultimate decision in 1995 came in two parts. The first decision, in addition to stating that Fox was in violation of Section 310(b)(4), stated that despite the contention of the Metropolitan Council of the NAACP Branches, the originator of the ownership complaint, there was no alien control of the broadcast licenses.[72] Since

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[67] *Id.* at 8458.

[68] *Id.* at 8459.

[69] *Id.* at 8461.

[70] *In the Matter of Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934*, 103 F.C.C.2d 511, 516 (1985).

[71] Fox I, *supra* note 7, 8456.

[72] *Id.* at 8518.

Murdoch held 76 percent of the voting rights at THC,[73] exerted almost complete control over THC and Fox, [74] and had substantial influence over the workings of News Corp.,[75] there could be no realistic claim of alien control. The FCC also ruled that Murdoch's duties as chairman of News Corp. did not make him a representative of an alien company since his actions were not controlled by News Corp.[76] The FCC delayed a decision on the public interest question for 45 days so that Fox could show why its ownership structure should be allowed.[77]

In its second decision, the FCC ruled that the public interest was served by allowing Fox to remain over the Section 310(b)(4) limitation. The Commission cited three reasons why it came to that conclusion: the statute allows for such a possibility; an American citizen (Murdoch) controls Fox and exercises substantial influence over News Corp.; and national security was not implicated.[78]

### *Implications of the Fox decision*

The Fox decision offers support for those who wish to see foreign money enter the American broadcast industry. The cases clearly show that despite protestations to the contrary, Section 310(b)(4) is not a hard and fast rule but a guideline from which the analysis begins. If the indirect ownership provision were truly set in stone, Fox would have lost its licenses since News Corp.'s stake in THC far surpassed the 25 percent maximum. Instead, the FCC accepted the structure, claiming that Fox could not have known about the prior ruling dealing with equity stakes.[79] While that statement may be true as far as it goes, there is no reason to think that the FCC wasn't aware of its own ruling. Fox filed its original application on June 24, 1985,[80] with the transfer finally taking effect on March 6, 1986.[81] The ruling on the treatment of equity stakes was adopted on May 31, 1985, and released on June 25, 1985.[82] Whether anyone associated with Fox was aware of the ruling or not, the FCC should have been. For that reason, the FCC's protestations about the importance of foreign ownership restrictions in 1995 seem disingenuous after the way it handled these rulings.

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[73] *Id.* at 8514.

[74] *Id.* at 8515.

[75] *Id.* at 8519.

[76] *Id.* at 8522

[77] *Id.* at 8524.

[78] Fox II, *supra* note 7, at 5725.

Commissioner James Quello proved to be a major supporter of Fox retaining its broadcast licenses in 1995. In fact, he wrote against having the 45-day period for Fox to prove its ownership structure was in the public interest, stating that there was enough information already on the record to show that it was.[83] Quello said Fox was acting in the public interest for the following reasons:

> The first key factor is that Fox is controlled both in law and in fact by an American citizen. The other key factor that was decisionally significant to me was that in approving the applications the Commission would finally be creating the long-sought but hitherto-unattained fourth broadcast network.[84]

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[79] Fox I, *supra* note 7, at 8456.

[80] *Id.* at 8457.

[81] *Id.* at 8459.

[82] *In the Matter of Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, supra* note 70, at 516,

[83] Fox I, *supra* note 7, 8526. (Quello concurring)

[84] *Ibid.*

With this statement, Quello ignored certain points that were the bases for restricting foreign ownership in the first place. According to how the FCC has interpreted Section 310 (b)(4), there would have to be a very good reason to allow partial foreign ownership, even if the license-holder was controlled by an American citizen.[85] A mere six months later, in making rules for foreign companies to enter the American telecommunications market, the FCC wrote:

> We recognize that the burgeoning number of information and entertainment sources has lessened the concern that misinformation and propaganda broadcast by alien-controlled licensees could overwhelm other media voices. Although somewhat alleviated, this concern remains a real one. We do not believe that the time has yet come to ease restrictions on alien ownership of broadcast licenses to the extent that would result from the implementation of an effective competitive opportunities test in the broadcast context.[86]

At no point in the Fox decision did the FCC explain how the Fox case warranted such an exception, other than pointing out that it served to fulfill a FCC objective, creating a new network.[87]

Quello could allow Fox to exceed the ownership benchmark because, "if something material changes, the Commission will have the opportunity to approve any change, or disapprove any change, or even change any change, in the normal course of our customary assignment and transfer processes."[88] In other words, if something happens, the FCC has the authority to fix it. During the decade Fox had the broadcast licenses before the 1995 decisions, there had been no undue foreign influence.[89] Since that was the main reason for the benchmark's creation in the first place, there is no reason to solve a problem that doesn't need solving, said Quello.[90] If that statement is true, there is no reason why it could not be used to allow other foreign companies to enter the American market. After all, there's no reason to try to fix a problem that hasn't occurred.

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[85] *Supra* note 4, 310(b)(1,2)

[86] *In the Matter of Market Entry and Regulation of Foreign-Affiliated Entities, supra* note 19, at 3947.

[87] Fox I, *supra* note 7, 8526. (Quello concurring)

[88] Fox I, *supra* note 7, at 8530. (Quello concurring)

Outside the contradictory analysis by the FCC in the Fox case, there is a basic problem that permeates every indirect ownership case before the FCC. Again, it's Quello's concurrence that indicates the problem. He wrote, "Finally, this law has always been waivable upon a persuasive showing that, under the facts of an individual case, exceeding the 25 percent benchmark would serve the public interest."[91] While this is how the FCC interprets Section 310(b)(4), that is not how the law is written. The law states, "No broadcast license…shall be granted to or held by…(4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens…if the Commission finds that the public interest will be served by the refusal or revocation of such license."[92] If the letter of the law is followed, the burden is not on the company to show why it is in the public interest for a license to be granted; the burden lies with the FCC to show why the public interest demands the license's refusal. The House Commerce Committee in its 1995 final report noted this misinterpretation and said that removing the prohibition of alien directors from Section 310(b) did not "constitute congressional acquiescence to the

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[89] *Id.* at 8529. (Quello concurring)

[90] *Id.*

[91] *Id.* at 8530. (Quello concurring)

[92] 47 U.S.C. § 310(b)(4) (1998).

Commission's past misinterpretation of section 310(b)(4)."[93] In other words, the FCC has misread the indirect ownership provision since its inception in 1934.

### *Conclusion*

In today's society, there is no reason why the FCC should prevent foreign companies from owning portions of broadcast license-holders, either directly or indirectly. Congress created the foreign ownership provisions to protect the national security of the United States and retain control of broadcast frequencies, a scarce resource at the time. With the number of alternative outlets that serve the same purpose as radio and television, but do not fall under the Section 310 regulations, scarcity is no longer a valid argument, a fact pointed out by the House Commerce Committee in its final report on the 1996 Telecommunications Act.[94] The FCC, on the other hand, has shown more concern over who controls the content of broadcasts rather than the 1934 version of national security.[95]

The FCC has already shown a willingness to put aside the foreign ownership restrictions with the telephone companies. Between the longstanding misinterpretation of the indirect foreign ownership provision by the FCC and its perception of Fox's success, the Commission cannot realistically claim that it is in the public interest to restrict ownership by foreign entities. The FCC's acquiescence to Fox's ownership structure proves that there are instances where foreign ownership is not only allowable but also desirable. Fox's success shows that foreign money can aid American companies and still keep the broadcast station American. In addition, the FCC's own rulings and attitudes show that there are no longer any reasons why foreign companies should not be allowed to exceed the direct or indirect foreign ownership limits.

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[93] H.R. REP. NO. 104-204, *supra* note 59, at 121.

[94] *Id.* at 54.

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[95] *In the Matter of Market Entry and Regulation of Foreign-Affiliated Entities, supra* note 19, at 3946.

# The First Amendment & Postmodern Tendencies in Cyberspace

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# The First Amendment & Postmodern Tendencies in Cyberspace

*Abstract*

To address the possibilities and difficulties of expression on the Internet, legal scholars and courts have begun to articulate jurisprudence. While initial signs boast of a robust marketplace of ideas, missing from the discourse has been an examination of the postmodern tendencies of cyberspace. This paper reviews developing jurisprudence and offers a unique perspective of how the First Amendment may protect expression in the cultural environments of converging and evolving media.

## Introduction

Clues to answering complex questions of mediated expression in an information society reside partially in legal philosophy and social theory. But such discovery of jurisprudence is especially difficult in an evolving communications environment that has even been described by the Federal Communications Commission as a "digital tornado."[1] Because of inherent features like user interactivity, decentralized network structure, digitization[2] and the displacement of geographically based jurisdictions,[3] the Internet[4] and cyberspace have already presented challenges for the application and creation of laws concerning privacy,[5] copyright,[6] telephony,[7] and freedom of expression.[8] In some respects, even the discussion of jurisprudence in an era of technological and market convergence may appear to be an academic exercise, for no one can predict the future with certainty. After all, today's Internet may be only scratching the surface of a communications revolution, one already characterized as an information age and network society.[9]

This paper discusses varied conceptualizations of freedom of speech jurisprudence as applied to cyberspace, and thus serves as a useful dialogue for advancing communication and information in a digital era. After examining scholarship on suggested speech models and First Amendment theory addressing the Internet, the marketplace of ideas, and its inclusion in recent judicial interpretation, will be discussed. In particular, an emerging marketplace of ideas is unfolding in cyberspace, as evidenced by the Supreme Court's first-ever review of the Internet in *Reno v. ACLU.*[10] Such recognition and exploration uncovers how unique the Internet is compared to traditional media and lines of communication.

In the end, it will be suggested that fulfilling the potential marketplace of ideas may require a paradigm shift that captures the postmodern cultural and technological characteristics of cyberspace — a perspective which has not been explicitly articulated by legal and First Amendment theorists. Thus, when advancing policy initiatives and building jurisprudence for the Internet, we should choose to utilize the First Amendment in an affirmative manner that will embrace postmodern culture and celebrate discourses among as many individuals as possible while being sensitive to the evolving nature and environment of cyberspace.

## First Amendment theory applied to cyberspace & convergence

With tremendous foresight, political science and legal theorist Ithiel de Sola Pool wrote about the promise of new technologies more than fifteen years ago before the Internet and technological convergence emerged as trends. He envisioned networked computers to be the "printing presses of the twenty-first century,"[11] contending that many forms of traditionally published material would be disseminated digitally via computers and electronic networks. He foresaw the potential and growth of new technologies:

> The technologies used for self-expression, human intercourse, and recording of knowledge are in unprecedented flux. A panoply of electronic devices puts at everyone's hand capacities far beyond anything that the printing press could offer. Machines that think, that bring great libraries into anybody's study, the allow discourse among persons a half-world apart, are expanders of human culture. They allow people to do anything that could be done with communications tools of the past, and many more things too.[12]

To liberate new digital frontiers, Pool outlined a set of principles to instill the highest amount of freedom of speech for electronic communication technologies. Fundamentally, he contended the "First Amendment applies fully to all media (both electronic & print)." In addition, "anyone may publish at will" without the threat of prior restraint. Regulation to curtail freedom of speech should only be a "last recourse" because "in a free society the burden of proof is on the least possible regulation of communication." Common carriers must be required to interconnect and, like government, should not be concerned with what content is carried on their networks.[13] While advancing these principles for freedom, Pool was also hopeful that these technologies would play their own natural advocacy role and resurrect free communication.

He is not alone in his belief. In addition to the judicial optimism apparent in the review of the Communications Decency Act,[14] many modern legal theorists also believe new technologies have the potential, if regulated properly, to bring new opportunities for expression to our society.[15] This section will provide a brief overview of recent scholarly writings on the application of the First Amendment in cyberspace.

Perhaps the easiest entry point to discuss approaches of applying the First Amendment to the Internet is to review Harvard Law Review's *The Message in the Medium: The First Amendment on the Information Superhighway.*[16] In essence, the goal of the First Amendment in cyberspace is to protect messages and content. "To the extent that technology is relevant at all, the Court should focus not on the medium of transmission, but on the relationship between technological characteristics of the medium and underlying First Amendment values."[17] Technological convergence will only continue to dissolve differential First Amendment applications, as eventually content will be converted into digital bits sent along fiber optic cables. Scarcity and pervasiveness, rationales used by Courts to regulate broadcasting, will become contestable in the world of the information highway. Alternatively, infinite choice and interactivity will replace old hierarchical systems and give consumers newfound active discretion. Along the information highway the First Amendment should "serve as a shield against governmental suppression" and "also act as a sword to ensure access."[18]

Meanwhile, Patrick O'Neill believes new and converging communications technologies possess superior characteristics over other media that are worthy of a new information flow model.[19] In this context, the First Amendment should allow individuals to assume greater control in optimizing the reception of information and content. Policies inline with such an approach include government intervention and support of the evolution of universal service, fair interconnection and open architecture, standard-setting, and common-carrier regulation for bottleneck facilities. Although the government should not impede information flow on the basis of content, it may restrict the flow of material on the basis of copyright infringement, personal privacy and intrusion. O'Neill elaborates on the interests of the First Amendment and regulatory role of the government in an age of convergence:

> The tendency of modern communication systems to make information available and ideas easily available advances the interests of the First Amendment. The primary regulatory role of the government should be to intervene in areas where the free market is not serving to optimize the information flow. The secondary role should be to provide the legal means for individuals to control access to proprietary, confidential or unwanted information.[20]

O'Neill believes the characteristics of computer communication — namely user control and access to information — establish the basis for a new model which realizes that "all electronic communication is taking on the characteristics of computers and digital networks."[21] Therefore, the First Amendment must move past medium-specific applications and models and concentrate on enhancing the flow of information in a converging, digitized arena.

Despite the advocacy of an information flow model. Steven Bredice is confident that new media hybrids on the information highway may be regulated by using a combination of existing models and applications on an as-needed basis. Media hybrids, writes Bredice, "should be subject to the least restrictive regulations possible, consistent with the preservation of ideological diversity and economic competition in the mass communications market."[22] Bredice contends a single First Amendment standard is inapplicable to the issues and challenges raised by media hybrids. Instead, First Amendment standards, as applied to print, cable, common carriers and electronic publishing, present a flexible, multi-pronged approach, if needed, to ensure viewpoint diversity and competition.[23]

On the other hand, some scholars argue that mutually exclusive, medium specific categories of First Amendment applications are no longer justified in the era of convergence. Rather, convergence and the benefits of new technologies, warrant the application and greater protection of the traditional print model. Thomas Krattenmaker and L.A. Powe, Jr. argue freedom of speech liberties should not be dependent on the technology of the medium. The Supreme Court made an unfortunate error in developing a set of First Amendment principles that strayed from the print model. As convergence grows, only a unitary First Amendment application will work for mass media. The scope of regulation should include the following principles: editorial control given to private institutions while government simultaneously fostering access to the media and encouraging diversity in the media marketplace, but not at the expense of one another.[24] The application of these principles, already imbedded in the print model, should forbid content control, reduce barriers to entry for potential speakers and even allow room for common carrier type regulation.[25]

Robert Corn-Revere believes a single, traditional First Amendment standard is also appropriate in the age of convergence. Corn-Revere classifies and examines three theoretical First Amendment approaches that have been used to regulate media: incrementalist, revisionist, and traditionalist. An incrementalist believes in granting free speech liberties gradually to new technologies and media. In doing so, the First Amendment is granted different levels of protection, solely dependent on the specific medium. Despite the varying degrees of protection among various media, freedom of expression is achieved through the combination of all media. Revisionists contend an unregulated press without government oversight greatly jeopardizes freedom of speech. The government has a responsibility to take an active role in fostering First Amendment values like public debate, diversity of viewpoints and access. Like the incrementalist, medium-specific approaches to the First Amendment are rightly justified. In contrast, the traditionalist favors a separation between government and the press. New technologies and media do not warrant medium-specific applications of the First Amendment; rather, new technologies should be protected by the same standards that apply to print.[26]

After evaluating each of these perspectives, Corn-Revere believes it is essential to resort to and keep the separational relationship between government and the press. He expounds on how the traditional perspective is well-suited for convergence:

> Traditional First Amendment doctrine is up to the task of evaluating cases involving new communication technologies. The approach assumes that different media have different qualities, but treats the characteristics as tools of analysis, not as catalysts for a separate constitutional standard.[27]

The revisionist and incrementalist perspectives fail on their own merits for creating differential Constitutional standards for each distinct medium. Ultimately, traditionalists like Corn-Revere believe in protecting the core values of the First Amendment regardless of the technology and transmission mode.

Like Corn-Revere, Donald Lively believes applying different medium-specific analyses that have been historically used by courts and legislators would be detrimental to expression if used in the era of convergence.[28] Lively warns we must proceed with caution and shed our tradition of incongruent modes of regulation:

> For a future defined by convergence, the crucial question is not whether the First Amendment is relevant but what version of it should apply. Separate freedom of press models for print and broadcasting have resulted in contest-like circumstances for newer communications technologies which must demonstrate which established medium they resemble most. Historically, attention to difference has been problematic because of the confusion, uncertainty, and even incongruity it has generated. Even assuming that medium-specific analysis eventually gives way, the critical issue that looms is what First Amendment tradition will prevail.[29]

The Internet tradition should be guided by consumer choice and interactivity — two dominant characteristics of new technologies and media. Although Lively does not specifically identify the proper medium approach to apply to cyberspace, he believes choice and interactivity may restore access and First Amendment elements that have been constrained by the media, especially broadcasting. Furthermore, choice and interactivity should increase diversity and participation while putting to rest the regulatory rationale of scarcity.

Legal scholar Ethan Katsh envisions new communication technologies transforming the way in which we view our First Amendment.[30] Computer networks, two-way interactivity, evolving visual communication and hypertext are all potentially liberating features of cyberspace. To Katsh, the features and opportunities of these new technologies contrast greatly with print:

> In general, in terms of information, much of what was scarce is becoming abundant, much of what was distant is coming closer together, much of what was secret is opening up. These trends support many broad First Amendment goals and interests by expanding capabilities for working with information and by removing many controls over communication that are inherent in print.[31]

Katsh believes these new technologies are the elements of a new cultural space. Participants, through the use of these tools and their own cultural space, will erect new cultures of communication and blur physical boundaries. "The marketplace of ideas is now global as well as national and individual as well as institutional."[32] The new cultures will eventually result in the creation of new authority spheres and relationship modes that transcend territory and, in effect, begin to conceive the future role of the First Amendment.[33]

Cass Sunstein is leery of the First Amendment implications involved in relying too heavily on the marketplace of ideas.[34] Sunstein believes government should fulfill the democratic aspirations of the First Amendment when the marketplace produces insufficient outcomes in the mass media, including cyberspace. Thus, he contends Madisonian principles, which are apparent in the regulation of broadcasting and in *Turner v. FCC*,[35] may play an important role in cyberspace. According to Sunstein, the Madisonian traditions main focus is on "public deliberation," whereby "governmental efforts to encourage diverse views and attention to public issue are compatible with the free speech principle—even when they result in regulatory controls on the owners of speech sources."[36] This tradition was purported by Meiklejohn and recognized by the Court in *Sullivan*,[37] *Red Lion*[38] and, most recently, *Turner*.[39]

Nonetheless, Sunstein readily admits he is not exactly sure how the promise of new technologies will affect democracy and free speech. He acknowledges new technologies like the Internet have the potential to work well with the marketplace of ideas because they increase the prevalence of outlets and speakers — in other words, the issue of scarcity is no longer a serious restraint. The problem for Sunstein lies in how free markets will meet democratic goals of citizen participation and debate, including access initiatives to information. The risks of an increasingly online world for Sunstein include the potential adverse consequences of "sensationalism, ignorance, failure of deliberation and balkanization."[40]

Anne Wells Branscomb encourages lawyers, legislators and judges to refrain from applying rigid legal rules to the developing world of cyberspace.[41] Light-handed, limited regulation will allow the marketplace to develop emerging technologies like the Internet and its respective social structures, which have been forming. Branscomb readily identifies the tension "between the legal expectations of the real world and the developing "nettiquette" of the "netizen" of cyberspaces.[42] But, as Branscomb suggests, often cybercommunities create their own rules and sanctions to counteract unabiding users.[43] Shouldering the promise of cyberspace with current media regulation would be foolish:

> Cyberspaces are populated by people-to-people communication—including person-to-person, some-to-some, and many-to-many. Computer-mediated communication offers an environment unlike any heretofore made available, with the potential for genuinely interactive and cooperative innovation. To saddle such promise with an overload of baggage from a bygone era would be tragic.[44]

Interactivity and creativity among users should become fundamental First Amendment principles and play important roles in the formation of technologies like the Internet. To remedy occurrences involving hate speech and harassment, Branscomb suggests users need to devise a responsible and harmonious balance between anonymity (identity remaining secret), autonomy (self-driven exploration) and accountability (responsible for one's own actions).

Jerry Berman and Daniel Weitzner believe users should guide the First Amendment and maintain control over what material they wish to access in cyberspace.[45] Because we are at a formative stage of development for interactive communications media, it is appropriate to recognize two values that are crucial to the livelihood of the First Amendment: "maximizing access to diverse information sources and minimizing the government regulation of speech."[46] Historically, media have been regulated by the characteristics and network architecture of their respective medium (i.e., broadcasting as a scarce, public resource has received the strictest regulation). New media like the Internet exhibit inherent characteristics — interactivity, choice, decentralized control and access — that, if properly maintained and fostered, will enhance opportunities to reach a higher degree of First Amendment values.

In order to attain greater interactivity, choice and diversity among citizens, Berman and Weitzner believe new media must exhibit a certain style of network architecture:

> The scarcity that characterizes today's mass media will be fully replaced by abundance only when a network with the following characteristics is in place: (1) a decentralized, open-access architecture; and (2) open endpoints, providing easy access for all potential content providers and content users.[47]

In addition to a decentralized architecture and open interfaces proliferating the number of speakers, users must also have sufficient control to discriminate between information they wish to receive and keep out. New interactive media differ substantially from traditional mass media because they provide users with greater control mechanisms and choice. These mechanisms, such as filters and rating systems, will reduce the rationale for the government to intervene and create intrusive content regulations to protect certain segments of society from harmful, objectionable material. Berman and Weitzner adamantly contend "individual users, not the government, should be entrusted with the task of controlling the content to which they and their families are exposed."[48] If proper architecture and user choice is not adopted to new media like cyberspace, the potential bright future of First Amendment values, including information diversity and participation, will welter away.

While the aforementioned scholars ponder how to position the First Amendment to interpret and legislate laws, the larger global community is examining its own respective content policies for the Internet. The Global Information Infrastructure (GII) initiative purports to bring advanced information and telecommunications services to the world. Nonetheless, despite the promise of the GII, nations and governmental bodies have implemented or proposed various solutions to fight the prevalence of pornography, hate speech and even political speech in cyberspace.[49] In the most extreme cases, government officials in China and Singapore implemented proxy servers and created firewalls designed to filter objectionable material to and from its citizens. Because of the Internet's global capabilities, potential expression may be limited by restrictive nationalistic approaches to regulating content.

Although creating a First Amendment model in cyberspace provides a quandary to say the least, there are scholars who also recognize that content control on the Internet presents a unique international regulatory dilemma. Much of their discussion has centered on the belief that cyberspace knows no borders and, as a result, often confuses and confounds jurisdictions. A. Michael Froomkin contends the transitional nature and technological characteristics of the Internet create opportunities for regulatory arbitrage whereby persons may "arrange their affairs so that they evade domestic regulations by structuring their communications or transactions to take advantage of foreign regulatory regimes."[50] For instance, people living within borders without the privileges of free speech may resort to communicating anonymously in a liberated country.[51]

To remedy this jurisdictional phenomenon, David Johnson and David Post propose the creation of a distinct set of laws be developed in a new cyber forum. This new cyberlaw would include self-regulating rules which would simplify current legal problems stemming from defamation, obscenity and copyright violation. As necessary consensus building among users will inevitably face challenges, treating cyberspace as a separate space and the right to exit should play major roles in cyberlaw. In effect, these two characteristics will allow for distinct subsets of communities and the formation of internal, as opposed to geographically-based, borders.[52] Post believes the treatment of cyberspace as a distinct place and erosion of geographic boundaries on the Internet gives "hierarchically organized non-government organizations" (i.e. individual networks or Internet Service Providers (ISPs) ) a comparative advantage to regulate the Internet.[53]

While Johnson and Post suggest cyberspace sovereignty, Lawrence Lessig cautions against such normative arguments. While new law will evolve, the separation between real space law and cyberspace law will not be sustained, as the Internet may be "regulated by real space regulation to the extent that it affects real space life."[54] Lessig contends zoning — the emergence of facilitating boundaries — will eventually replace the wildness of cyberspace. In contrast, Timothy S. Wu suggests a generative model of 'minimally' sovereign cyberspace. Norms and rules of cyberspace may become recognized and respected by a significant number of states. It is minimal because only the norms and rules likely to gain wide appeal will be those "individuals with wide varying persuasions find acceptable."[55] Nonetheless, Wu believes the Internet will likely remain independent because of government and public inertia. Meanwhile, Henry Perritt suggests international arbitration for civil disputes and a criminal international law court as solutions to reach consensus. Ultimately, Perritt believes intermediaries like network operators offer better alternatives than depending on traditional law that is tied to real-world, geographic boundaries.[56]

Despite the scholarly commentary to remedy the transnational border effect of cyberspace, many nations are entangled in applying their own jurisdictional law and policies and, as a result, deprive citizens' of access to information and ideas. Karen Sorrenson of the Human Rights Watch warns of these potential dangers:

> on-line censorship laws, in addition to trampling on the free expression of rights of a nation's own citizens, threaten to chill expression globally and to impede the development of the Global Information Infrastructure (GII) before it becomes a global phenomenon.[57]

Sorrenson believes prior censorship and an explicit prohibition against restrictions of free expression by indirect methods are two essential elements to ensure freedom of speech survives in cyberspace. Sorrenson also contends rights of freedom of expression, access, and privacy are supported by both Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights.

As demonstrated, there are many theories of how the First Amendment should play a role to ensuring freedom of expression in the era of technological and market convergence. Given the uncertainty and complexity of cyberspace, views on how to use the First Amendment to reach an open and expressive universe are divergent. Jurisdictional issues and physical borders are also less transparent in computer mediated communication. Nevertheless, the aforementioned scholars do find promise and hope in evolving new media like the Internet. Their commentary reveals certain inherent characteristics which call upon us to examine cyberspace differently than other traditional mass media:

- User Choice
- User Interactivity (two-way medium)
- Decentralized Control
- Diversity of Content
- Erosion of physical, geographic borders

Such aspects represent a departure from traditional media because they increase the ability for citizens to take an active role in acquiring and distributing information more freely.[58] If access to new technologies like the Internet are made widely available, one may naturally assume that these characteristics may positively affect democracy by increasing debate and citizen participation across the globe. Thus, it is extremely important to account and incorporate how the Internet and an online world significantly impact and positively evolve the media landscape and overall expression.

## The emergence of a new marketplace of ideas

Setting aside various First Amendment jurisprudential models, synthesis of contemporary legal scholars suggests the technological and cultural characteristics of cyberspace provide for a new marketplace of ideas. Not surprisingly opinions from litigation involving the CDA — the first Congressional attempt at combating speech on the Internet — contains significant threads of the marketplace of ideas theory. A longtime challenge facing constitutional scholars is to define and interpret what is meant by our First Amendment, "Congress shall make no law...abridging the freedom of speech."[59] Unfortunately, there are no clear cut answers to such a question, only a body of theory and

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jurisprudence which has been developing for centuries. Although divergent beliefs exist, many agree that freedom of speech is an important underpinning and vehicle for decision making in the democratic political process. Within the 20th century, the classic marketplace of ideas theory has risen and taken center stage.[60] The following pages provide discussion of this laissez-faire approach to free speech theory and supply grounding to examine its presence in recent litigation involving the Internet.

One of the key works on freedom of expression is poet John Milton's 1644 work *Aeropagitica.*[61] Milton, concerned with the evils of licensing and censorship, meticulously refuted the power of government officials to pre-approve all written materials before they were published and disseminated to citizenry within the borders of England.

Milton explored the benefits of what is known today as "the self-righting principle," contending we must tolerate opposing viewpoints even if it goes against the beliefs of our government. Allowing false points of view only reaffirms the truth. Additionally, under a licensing scheme, if we believe something is correct, when in reality it is false, we may never know the actual truth. Milton sincerely believed that our government and citizens are only more powerful if there is a healthy and well-informed debate, something which would be impossible under licensing of the press.

In one instance, Milton proclaimed God intended to make man capable of his own decisions:

> For those actions which enter into a man, rather than issue out of him, and therefore defile not, God uses not to captivate under a perpetual childhood of prescription, but trusts him with the gift of reason to be his own chooser.[62]

Man possesses the liberty and intellectual capacity to determine what is right and wrong and what course of action is proper and improper. God does not hold a tight reign over man like a parent holds over a child. In order to make well-reasoned decisions, man must be free to discover the truth and receive all types of viewpoints on all types of issues. In his eyes, truth is more likely to arise out of unfettered discussion than out of repression. This "self-righting principle" and emphasis on truth is an undercurrent to the marketplace of ideas theory.

John Stuart Mill complements the 'self-righting principle' in his fundamental work *On Liberty,*[63] in which he argues for the liberty of individuals to possess freedom of thought, opinion and action in society. Mill expanded upon Milton's idea of the importance for individuals to make their own decisions and search for truth without governmental interference.

To bolster his argument for freedom of thought and opinion, Mill cited three dangers to the suppression of opinion. First, suppression of opinion may blot out the truth, even if the opinion in question is conventionally far-fetched. Second, there is no harm in hearing and refuting a false opinion; instead, it can only strengthen truth, convictions and conduct. Third, no opinion, no matter how outrageous or correct, is completely true or false. Partial truths from opinions may be useful to develop intellect, improve truth and, consequently, individuals may make better decisions about their individual and collective actions. Mill makes a compelling case for freedom of thought and opinion when he writes:

> Not the violent conflict between the parts of the truth, but the quiet suppression of half of it, is the formidable evil; there is always hope when people are forced to listen to both sides; it is when they attend to only one that errors harden into prejudices, and truth itself ceases to have the effect of truth by being exaggerated into falsehood.[64]

Mill's point is that there is much to be valued and learned when citizens are free to educate themselves and discover truth. The only way this is possible is for government (the collective) to have no control on freedom of thought and opinion.

According to Mill, individuals should cultivate themselves — their personality, decision-making skills, morals, diversity, etc.— because this is an important characteristic for the progress of the state. Further, society is better off in an environment that allows citizens to choose and process what they want to read and hear because it expands their own capabilities and understanding of the world around them, thereby increasing their decision-making skills and curiosity for truth.

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Both Mill and Milton's endorsement and rationale for liberty of thought and expression provide a basis for Oliver Wendell Holmes's theory, whereby truth will prevail among unfettered speech in the marketplace. Holmes, a former Supreme Court justice, brought us the "marketplace of ideas" theoretical basis to the First Amendment in a dissenting opinion in *Abrams v. United States*.[65]

It was in *Abrams* that "Holmes began to consider and to discuss the implications of the congressional legislation (of sedition)."[66] Whatever his intentions, Holmes' dissenting opinion in *Abrams* demonstrates the classic marketplace of ideas theory:

> To allow opposition by speech seems to indicate that you think the speech impotent ... When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached in the free trade of ideas — that the best of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. ... I think we should be extremely vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death.[67]

Thus, under the classic marketplace of ideas theory, the responsibility of government is to keep its hands off speech, because the market of ideas and speech will self-correct and sustain itself. Holmes's theory is more or less a laissez-faire notion.[68] Only under a clear and present danger will governmental intervention on freedom of speech and political thought be allowed, and only to a minute degree.

In his dissent and clarification of the clear and present danger test, Holmes espoused that a free exchange of ideas in the market will lead to truth (the self-righting principle). Today, his theory is omnipresent, as citizens have more outlets than ever before, including the Internet, through which unfettered exchange of truth may take place. His theory also led the way for new discussions, interpretations and applications of First Amendment law and theory.

But in markets, inaccessibility and competition may be ruthless — even among ideas. Like Sunstein, legal scholars Jerome Barron and Owen Fiss contend market failure may exist in the Holmesian free exchange and trade of ideas.[69] The term market failure

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refers to an economic concept relating to outcomes of a market under a free enterprise system. Governmental intervention is warranted only when the market is unable to maximize public utility. In theory, markets in fact do not fail; rather, people do not like the outcomes of a market (e.g., the problems which may result from monopoly power and abuses).[70] Today, it is a common occurrence for government to regulate markets to protect the consumer and public from undesirable market outcomes in telecommunications and other sectors, even in matters relating to speech. Barron and Fiss wish to correct the inadequate outcomes that occur in an unfettered marketplace of ideas overrun by commercialism.[71] Whether by encouraging the press to provide a wider array of viewpoints, or by allowing the government to decide what was missing on CBS, both believed in fostering public debate. While espoused before the advent of the Internet, their theories suggest the First Amendment may play an affirmative role in public debate.

One may ponder whether or not ideas are truly competing in today's evolving cyber-landscape.[72] For instance, those who do have access to the Internet may have a unique potential for their own ideas to be heard and compete among a vast array of content. While ruling on the constitutionality of the Communications Decency Act (CDA),[73] the courts addressed this very issue. Further analysis of litigation reveals a new marketplace of ideas exists, so much so, that liberating visions and ideals about the potential of the Internet are being readily articulated by the courts.

Before the three-judge panel could listen to arguments and properly evaluate the CDA, the parties and judges agreed to evidentiary hearings regarding the evolving and expanding world of cyberspace. In addition to testimony from various experts and government officials, hearings included a live demonstration of the Internet.[74] After consideration of testimony and argument, the panel rendered an extensive, detailed findings of fact in its opinion. The findings of fact highlight many of the notions and elements of the Internet's marketplace of ideas.

The panel suggests cyberspace is a new medium, capable of two-way communication of text, video and sound among its self-determining uses. The Internet governs itself, as control is decentralized among its users: "no single entity — academic, corporate, government, or non-profit — administers the Internet."[75] The panel determined the World Wide Web (WWW) "was created to serve as a platform for a global, on-line store of knowledge, containing information from a diversity of sources and accessible to Internet users around the world."[76] Thus far, the WWW has become a popular and successful vehicle for "research, education, and political activities"[77] and to the panel's purpose of review, a vehicle for the distribution of sexually explicit material.[78] Overall, the Internet provides a myriad of viewpoints. "It is no exaggeration to conclude that the content on the Internet is as diverse as human thought."[79]

Because of the technology and decentralized control of the Internet and its relatively low barriers to entry, diversity of content is promoted and encouraged. The panel elaborates on this principle:

> The start-up and operating costs entailed by communication on the Ineternet are significantly lower than those associated with use of other forms of mass communication, such as television radio, newspapers and magazines.[80]

The panel believes disseminating material on the Internet is also an easy and relatively inexpensive[81] manner for a speaker to reach large audiences. "Individuals have a wide variety of avenues to access cyberspace in general, and the Internet in particular."[82] Users may obtain access to the Internet publicly through a library or school, or from home through their own initiatives and resources.[83] These low barriers to entry and ease of access encourage non-profit organizations and citizens to communicate their messages and add to public debate. By typing key words into search engines like Altavista, and through the use of hypertext (point-and-click ability) on the WWW, individuals may quickly locate public information from around the globe.[84] In addition, the technological features of cyberspace, where chat rooms, e-mail, and newsgroups are interactive and prevalent, provide opportunities for individuals to speak and listen to one another.[85] Thus, users may

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have discussions with other people and may even create 'virtual communities' that stimulate social interaction."[86]

In addition to finding the Internet to be a diverse and democratic carrier of information, the panel contends "communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden"[87] In fact, rarely do images appear accidentally; rather, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely tuning the dial."[88]

The panel's findings of fact contain significant threads of the marketplace of ideas theory. The panel is undoubtedly impressed by the diversity of views and voices on the Internet. Individuals don't have to own their own printing press or station to disseminate and publish information electronically. With comparative ease and access, a large spectrum of issues and material are available. In theory, the marketplace of ideas and "self-righting principle" are fostered in cyberspace, as truth will be found among diverse, competing viewpoints and ideas.[89]

Perhaps even more telling then the findings of fact, is the opinion of *ACLU v. Reno*. Unanimously, the panel attempts to derail the patently offensive and indecency provisions of the CDA from ever becoming realities. In the process, it discovered there is something entirely different about the Internet from other media.

According to Judge Stewart Dalzell, the solution to the failed outcomes of the marketplace of ideas lies within the Internet. "The Internet has achieved the most participatory marketplace of mass speech that this country — and indeed the world — has yet seen." In the panel's strongest endorsement of the Internet, Dalzell describes the promise and guarantees of the First Amendment in cyberspace:

> The Internet may be regarded as a never-ending worldwide conversation. The Government may not, through the CDA, interrupt that conversation. As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion. ... Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects.[90]

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Dalzell suggests the Internet is the solution to the worries and harmful effects of a commercialized mass media concerned with bottom lines and profit margins. Barron's and Fiss's theories are thereby supplanted, as Dalzell offers the Internet as a medium that has the potential to finally achieve a truly diverse marketplace of ideas. For Dalzell, stimulating access and public debate is not an issue on the Internet as it is in the arena of traditional mass media. After all, conglomerates do not own and control cyberspace as they do within the newspaper and broadcasting industries. Instead, the Internet is more or less controlled by individual users who, in effect, may replicate their own unfettered marketplace of ideas.

The Supreme Court affirmed the district court's ruling, echoing many of the panel's sentiments on cyberspace's unique ability to foster increased discourse.[91] By contending that the prevalence of pornography is steering citizens and their children off of the information highway, the Court believed the government failed to recognize the new opportunities the Internet affords. Justice Stevens, with specific reference to a new marketplace of ideas, elaborates on such shortsightedness:

> The dynamic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.[92]

In essence, because the CDA is not sufficiently tailored to meet a compelling government interest in shielding minors from indecent and patently offensive speech, the Court found the provisions would unnecessarily hinder the Internet's ability to expand the marketplace of ideas. If the CDA was left intact, adult speech in this new medium would be restricted to what was deemed appropriate for minors (those under 18 years of age). More importantly, a precedent of constraining the free trade of ideas would be established in cyberspace, thereby potentially discouraging users from participating on the Internet.

Congress attempted to rectify its concerns over children accessing pornography when it passed the Child Online Protection Act (COPA),[93] which many refer to as CDA-

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II.[94] COPA requires commercial Web sites to use an adult verification service or age screening mechanism to protect children (those under 17) from material deemed "harmful to minors."[95] Upon passage of COPA, parties led by the ACLU challenged the constitutionality of the provisions. In granting an injunction against the enforcement of COPA,[96] the district court embraced many of the earlier sentiments expressed in the CDA's rulings.[97]

In his opinion, Judge Lowell A. Reed, Jr. acknowledged many of the difficulties of unconventional speech from reaching the masses in traditional media compared to the Internet writing: "In the medium of cyberspace, anyone can build a soapbox out of web pages and speak her mind in the virtual village green an audience larger and more diverse than any other framers could have imagined."[98] Reed found fault with the breadth of COPA, contending that the "harmful to minors" standard could be used to curtail speech beyond the scope of pornographic commercial Web sites. [99]

Upon appeal, the Third Circuit recently upheld the district court's injunction finding COPA to be misconstrued for the Internet by relying on community standards to determine what is considered speech that is "harmful to minors."[100] "The Supreme Court has already noted that because of the peculiar geography-free nature of cyberspace, a 'community standards' test would essentially require every Web communication to abide by the most restrictive community's standard."[101] Thus, the inability of websites to restrict access based on a given user's geographic locale imposes an "impermissible burden on constitutionally protected First Amendment speech."[102]

While the battle continues to be waged by the courts and Congress, thus far the CDA and COPA litigation demonstrates an apparent endorsement of the marketplace of ideas as applied to the new medium of the Internet, one that is expansive enough to accept pornography. The Supreme Court found "the breadth of the CDA's coverage to be wholly unprecedented"[103] and a constitutional infringement on the rights of adults to access and disseminate indecent and patently offensive material. As Judge Reed notes, "In many respects, unconventional messages compete equally with the speech of mainstream speakers in the marketplace of ideas that is the Internet, certainly more than in most other media."[104]

## Missing Links — Postmodern expression & environs in cyberspace

The use of cultural studies and social research have been touted in recent years for the potential to inform communication law and policy.[105] Even though it may be contentious at times,[106] social theory may offer rich clues and serve as explanatory tool to describe what may be transpiring in society. Today social theorists agree that we are living in the midst of an information society, in which the flow, communication and acquisition information is a core component of the economy and social spheres.[107] However, not all would agree that we are living with a postmodern condition.

Not surprisingly, scholars and judges have shied away from offering an alternative, postmodern view to what may be taking place in cyberspace. New technologies may be part of the ebb and flow of a new cultural transformation that's primarily rooted in communication. Changes in communication environments have occurred throughout history, affecting patterns of perception and cognition in myriad ways. For instance, the invention of writing made abstraction possible, something that had been impossible for cultures of the oral tradition.[108] The advent of the printing press, standardization and fixity, along with tendencies toward rationalizing, codifying and cataloguing data, proved to be significant advances in the ability to communicate detailed information to mass audiences and allowed for combinatory activities of learning and the spread of literate religions.[109] If computers are in fact the new printing presses, then perhaps we are not looking carefully enough at what may be transpiring before us on the Internet. Examining the Internet through a postmodern lens offers interesting cultural insight worthy of exploration, especially in terms of trying to conceptualize the Internet in a radically different marketplace of ideas and communications paradigm.

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Postmodernism[110] refers to the emergent historical epoch in opposition to modernism, often characterized by such words as indeterminacy, dispersal, combination, and anti-narrative.[111] Central to the transformation from a modern to postmodern condition is the shift from the sovereign individual to a fragmented or ever-emergent self.[112] Given such trends it is not surprising that postmodernity has witnessed a recognition and discovery of the "Other," as evidenced in the work of Foucault,[113] as well of as cultural studies scholars concerned with gender and race representation in the media.[114]

While the Other continues to chart new waters, another avenue worthy of exploration in postmodernity lies within the ever expanding terrain of technological convergence represented by cyberspace. Science fiction writer William Gibson defines cyberspace as:

> A consensual hallucination experienced daily by billions of legitimate operators, in every nation. ... A graphic representation of data abstracted from the banks of every computer in the human system. Unthinkable complexity. Lines of light ranged in the non-space of the mind, clusters and constellations of data.[115]

Unthinkable complexity is one way of characterizing the Internet. Often seen as encapsulating the platform and medium of the future, cyberspace is inherently different from traditional forms of media — newspaper, broadcasting, and cable television — media which are arguably products of modernity. After all, the Internet is mutli-modal in nature, a combination of print, magazine, broadcasting, telephony and data. Two-way communication and interactivity allow those with access the ability to receive and publish material from their keyboards. The control of the Internet is also decentralized, representing a shift from the traditional hierarchical telephone network and information flow typologies of traditional media. With such new characteristics, one may begin to realize the symmetry which exists between the Internet and postmodernity. The potential for a plethora of diverse voices exists in cyberspace. Because no centralized control exists per se, these voices often express themselves, even anonymously, through a number of representations,

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outlets and applications, such as e-mail, IRC (Internet Relay Chat), WWW (World Wide Web) pages, BBS (Bulletin Boards), MUDs (Multi-user domains), and virtual reality.

In fact, the medium of the Internet manifests itself in a postmodern fashion. The discontinuity and amount of information on the Internet provide new possibilities and experiences that often result in empowering the self to become further fragmented or ever-emergent. Likewise, the expression and potential reception of the Other increases.

In describing modernity, David Harvey refers to the words of Baudelaire, noting it "is the transient, the fleeting, the contingent; it is the one half of art, the other being the eternal and the immutable."[116] For Harvey, such principles show modernism as relinquishing the past and finding meaning "within the maelstrom of change."[117] The Enlightenment period during the18th century welcomed such change and "saw the transitoriness, the fleeting and the fragmentary as a necessary condition through which the modernizing project could be achieved"[118] Principles of liberty, equality, faith in human intelligence and universal reason permeated society. Harvey saw the irony in the opposition between the ephemeral and eternal through the interplay of creativity and destruction:

> If the modernist has to destroy in order to create, then the only way to represent eternal truths is through a process of destruction that is liable, in the end, to be itself destructive of those truths. Yet we are forced, if we strive for the eternal and immutable, to try to put our stamp on the chaotic, the ephemeral, and the fragmentary. The Neitzschian image of creative destruction and destructive creation bridges the sides of Baudelaire's formulation in a new way.[119]

This 'creative destruction' was a tool used by artists to help make sense of the chaos characteristic during the modernist period. Interestingly enough, the idea of creative destruction/destructive creation may be seen as a potential method by which to make sense of and create order for the Internet. The Internet, because of its global, digital and packet switching characteristics, more or less erodes physical real-world boundaries, making it extremely difficult to apply any existing legal jurisdiction. While virtual communities have found it necessary to create their own rules,[120] thus far the government, artists, and media

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have been unable to put a stamp on the Internet through creative destruction.[121] So long as control remains widely dispersed, the Internet's postmodern tendencies suggest the medium may resist such a creative destruction from taking place.

Harvey believes we have transited from a modern to postmodern condition. While modernism attempted to transcend and counteract the 'eternal and immutable' elements of the ephermerality and fragmentation, "postmodern swims, even wallows, in the fragmentary and the chaotic currents of change as if that is all that there is."[122] In addition, "the idea that all groups have a right to speak for themselves, in their own voice, and have that voice accepted as authentic and legitimate is essential to the pluralistic stance of postmodernism."[123] In many ways, the number of Web pages and e-mail addresses in cyberspace continue to expand and grow in connected, yet fragmented segments, as it is increasingly harder to catalog and local information on search engines. With the outgrowth of ISPs (Internet Service Providers) and new access initiatives in schools and libraries, more voices are gaining a presence on the Internet (although there is a long way to go to achieve equitable access, both domestically and globally). Thus, the Internet may be seen as swimming in fragmentary change, while providing new opportunities for groups organizations and individuals to express themselves.

Concerned with critiquing assumed order and representation, Foucault warned against the limitations of modern language and culture. Before the 17th Century, order was constructed through resemblance — convenience, emulation, analogy, sympathy — all of which were grounded upon signatures. Semiology and hermeneutics were interwoven into the resemblances of objects are they are perceived; however, this interwoveness disappeared after the Classical Age. The role of language changed from describing what is before you to handling concepts as if they were neutral and transparent. Referring to classification methods of science, Foucault elaborates on the transformation:

> Every being bore a mark, and the species was measured by the extent of a common emblem. So that each species identified itself by itself, expressed its individuality independently of all others...but, from the seventeenth century, there can no longer be any signs except in the analysis of

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> representations according to identities and differences. That is, all designation must be accomplished by means of a central relation to all other possible designations. To know what properly appertains to one individual is to have before one the classification — or the possibility of classifying — all others.[124]

Disheartening to Foucault is what happens when something doesn't fit neatly into any of the classifying criteria. The Other may become lost or misrepresented because language has become transparent and lost its descriptive role. Thus, discourses or discursive practices may set rules as to what is legitimized and what is cast into the eclipse. Foucault, saw the postmodernism movement as a realization of how modern notions of reason, as evidenced by law, science and philosophy, may by there very nature, ignore the Other.

While the demographics of users may be critiqued,[125] Foucault would nonetheless be encouraged by the Otherness that is represented on the Internet. The diversity of content available is far beyond the limiting discourses of the Enlightenment and science. Moreover, the lack of order generally displayed in cyberspace lends even greater support to Foucault's overall implicit argument that we take order for granted as a given; instead, each culture may create its own order. Netizens in cyberspace are engaged in constructing and sorting out order through an abundance of information and voices. What's unique about the new order, however, is that many of the modern and land-based elements of law and reason aren't transparent or easily applicable in cyberspace. Rather, the Internet may be thought of as a pluralistic medium, one potentially encapsulating all of us as individuals.

## Conclusion: Using new principles & the First Amendment to embrace the expanding, new marketplace of ideas

Thus far, legal scholarship and the Courts have only begun to scratch the surface on uncovering the layers of meaning that exist on the Internet. While laudable in their efforts to unpack the various technological and cultural characteristics of cyberspace, the contribution of this paper lies in its abilities to recognize postmodernism as an informative lens to view the communication environs that are being created by cyberspace, especially in terms of recognizing the Internet's tendencies to foster postmodern expression.

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If one begins to cast the Internet as a reflection of a postmodern medium, then one may ponder the potential that exists for expression and, consequently, its implications for First Amendment jurisprudence and communications policy. The Communications Decency Act is one among many examples of the difficulties applying law to an international medium in which its users and technological features create its own virtual rules and borders. Traditional laws are met with tremendous resistance from users throughout the cyberspace community.[126] Even without this resistance, physical, real-world laws do not easily apply to a medium that knows no bounds or borders.[127] Thus, one must be careful in transferring and applying existing laws and norms to a medium like the Internet.

Ironically, the First Amendment, itself a byproduct of the Enlightenment and modernist project, may be used to combat legal dilemmas that arise to ensure democratic expression in a postmodern medium, and thus still serve as a fundamental guidepost for policy Allowing as many voices as possible on the Internet, though, will more than likely require a paradigm shift. To begin with, new malleable parameters for policy must recognize users and borders as ever-emergent. Terms to characterize the new "Internet as paradigm"[128] may include: network of networks, infostructure, multimedia, access, amplify, accelerate, empower, distribute, connectivity, disintermediate, incubation, possibilities, resilience, adaptive, robust, open, decentralized, participatory, pluralism, diversity, interactive, personalized, self-organizing, [129] ever-emergent and marketplace(s) of ideas.

Thus, reconceptualizing First Amendment jurisprudence should account for the positive attributes that postmodern tendencies offer in cyberspace. Because of its decentralized control, two-way interactivity, low barriers to entry, ability to eradicate physical borders and tendency to simulate participation among persons with diverse opinions, the Internet may be seen as the embodiment of the ever-emergent self, and therefore a new marketplace of ideas. As the terrain and scope of cyberspace increases —

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some portend it to be the 'killer application' or 'platform of the future' — representation of the Other should rise significantly.

With greater representation of the Other, a dynamic expansion of the marketplace of ideas may occur, especially if citizens are afforded access opportunities to remedy the current information gap and "digital divide."[130] The Internet could potentially revitalize public discourse, even perhaps the public sphere. In short, the public sphere refers to public life.[131] Such life may include the involvement and participation in matters outside the home and office, public discussion about common concerns and even public spaces that provide congregation and impetus for such activities to occur. In theory, more diversity and public participation will result in cyberspace because of characteristics like user choice and interactivity, leading to the establishment of new virtual spaces of discourse and public involvement.

At the very least, with access and training, individuals may create their own electronic printing presses through the construction of Web pages and communicate information to others via email, listservs, Usenet groups, and IRC. In other words, individuals would not be limited only to material that existed within the traditional mass media marketplace. With interactivity and choice, personal creation and dissemination would be included as valuable pieces of an immense electronic library of information — a radically different marketplace compared to the past. The First Amendment should be utilized to maintain such a prognosis, and consequently must be at the forefront to capture the cultural and technological potential of cyberspace.

As demonstrated, one may see how different the world of cyberspace is compared to traditional media and their respective cultural uses. Transferring those differences is not an easy task. Arguably the communication of mediated expression has a pervasive presence in our lives, and as the information economy grows, many citizens will learn how to better utilize information. But more importantly, if policy proceeds correctly, the

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general public may also have an unprecedented opportunity to express its views in a truly rich marketplace of ideas, as evident from the initial cultural signs of cyberspace.

Recognizing access and expression in the expanding marketplace of ideas will not solve all societal ills. Admittedly, problems will arise in a competitive marketplace of ideas, just as they do in any market. Issues pertaining to education, literacy, commercialization and interconnectedness will need to be confronted. Utilizing the First Amendment in a manner that allows individuals to choose when, what, why, where and how they enter into interactive discourse is a substantially different and beneficial direction for policy makers to adopt. As we enter the new millennium, we have an opportunity to proceed with policies that will establish a more diverse and equitable expression of discourses within our society.

So far scholars have only begun to unpack the cultural dimensions of cyberspace. The discussion presented signifies that we should move beyond the distinctions rooted in traditional First Amendment jurisprudential models. Undoubtedly it is important to recognize user choice and interactivity, decentralized control, diversity of content and the erosion of physical, geographic borders. But we also must not dismiss the various manifestations of postmodern culture on the Internet and other new technologies.

In the same vein, it is also important to find a model that breaks away from the print tradition as our regulatory model and template. Although the print model has enjoyed the lightest controls on speech, conceivably it may not foster all of the potential benefits of cyberspace. Cyberspace is an entirely different world than that of print, and carries with it, greater speech-enhancing qualities. The print model does not explicitly account for the two-way interactivity of the Internet. In an Internet world, one may instantaneously redress grievances and publish his or her own ideas in a comparatively easy fashion. In addition, one may be able to increase his or her exposure to a greater diversity of information globally than what is available in the physical world.

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Instead of relying on a physical, geographically-based print model, we must acknowledge that the medium-specific characteristics of the Internet deserve a unique jurisprudental model. While such a model may contain the functional equivalents of the speech-enhancing qualities of print, new elements should be created that account for the liberating qualities of a new communications environment that manifests postmodern expression. The First Amendment should be used as a template to place primarily focus on the ability of users to access and disseminate information freely, levying only limited constraints on categories of speech (e.g. libel and obscenity). In such a hybrid model, everyone becomes his or her own editor and publisher and is responsible for his or her own actions.

If we deem communication and the reception of ideas and information to be an integral part of our democracy, as well as a vital element to participation in the information society, then why wouldn't we want to reach our potential of being more culturally diverse and liberating than ever before? A new marketplace of ideas may be imminent, but not unless we begin to reconceptualize how we envision our new mediated environments.

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## Endnotes

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[1] See Kevin Werbach, Digital Tornado: The Internet and Telecommunications Policy, (viewed April 12, 1998) <http://www/fcc/gov/Bureaus/OPP/working_papers/oppwp29.pdf/>.

[2] See pages 18-22 of text describing the findings of fact and opinions regarding the litigation of the Communications Decency Act.

[3] See David R. Johnson and David Post, Law and Borders — The Rise of Law in Cyberspace, 48 STANFORD L. REV. 1367 (1996).; Lawrence Lessig, The Zones of Cyberspace, 48 STANFORD L. REV 1403, 1406 (1996).

[4] For a review of the how the Internet works, see Adam Giffin, EFF's Guide to the Internet, v. 3.20 (visited Dec. 1, 1999) <http://www.eff.org/pub/Net_info/EFF_Net_Guide/netguide.eff>

[5] See Joel Redidenberg, Restoring Americans' Privacy in Electronic Commerce, 14 Berkeley Tech. L.J. 771 (1999).; Federal Trade Commission, Self-Regulation and Privacy Online: A Report to Congress (July 1999) (visited October 26, 1999) <http://www.ftc.gov/os/1999/9907/pt071399.htm>

[6] See Digital Millennium Copyright Act, Pub L. No. 105-304, Sec. 201-03, 112 Stat. 2877 (1998) (codified at 17 U.S.C. § 512.)

[7] Internet Telephony uses the technology of packet switching and often circumvents the traditional end-to-end routing, access charges and universal support mechanisms associated with the public switched telephone network (PSTN). See Robert Frieden, Dialing for Dollars: Will the FCC Regulate Internet Telephony? 23 RUTGERS COMP.& TECH. L. J. 47 (1997).

[8] See Reno v. ACLU, 521 U.S. 844 (1997) (finding federal law restricting the transmission of indecent and patently offensive material to those under 18 years of age to be unconstitutional).; American Civil Liberties Union, 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech on the Internet, (visited Oct. 16, 1999) <http://www.aclu.org/issues/cyber/burning.html> (contending that the use of filters and rating systems on the Internet are inefficient and end up blocking material that is not objectionable).

[9] "A technological revolution, centered around information technologies, is reshaping, at accelerated pace, the material basis of society. Economies throughout the world have become globally interdependent, introducing a new form of relationship between economy, state and society, in a system of variable geometry." MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY 1 (1996).

[10] 521 U.S. 844 (1997).

[11] ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM, 224 (1983).

[12] Id. at 226.

[13] Id. at 246-48.

[14] Communications Decency Act of 1996 as contained in Title V, Sec. 502 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 133-35.; ACLU v. Reno, 929 F. Supp 824 (E.D. Pa. 1996) aff'd Reno, 521 U.S. 844 (1997)

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[15] See generally Jerry Berman and Daniel J. Weitzner, Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media, 104 YALE L. JOUR 1619 (1995).; Anne Wells Branscomb, Anonymity, Autonomy, Accountability, Challenges to the First Amendment in Cyberspace, 104 YALE L. REV. 1619 (1995).; The Message in the Medium: The First Amendment on the Information Superhighway, 107 HARVARD L. REV 1062 (1994).; Robert Corn-Revere, New Technology and the First Amendment: Breaking the Cycle of Repression 17 HASTINGS COMM. L.J. 247 (1994).; Patrick O'Neill, Optimizing and Restricting the Flow of Information: Remodeling the First Amendment for a Convergent World, 55 U. PITT. L. REV. 1057 (1994).; Steven A. Bredice, Comments: Media Hybrids and the First Amendment: Constitutional Signposts Along the Information Highway, 44 EMORY L.J. 213, 216 (1995).; M. Ethan Katsh, Rights, Camera, Action: Cyberspatial Settings and the First Amendment, 104 YALE L.J. 1681 (1995).; Cass R. Sunstein, The First Amendment in Cyberspace, 104 YALE L.J. 1757 (1995).; BILL GATES, THE ROAD AHEAD (1995); JONATHAN WALLACE & MARK MANGAN, SEX, LAWS AND CYBERSPACE (1996).

[16] The Message in the Medium: The First Amendment on the Information Superhighway, 107 HARV. L. REV. 1062 (1994).

[17] Id. at 1063.

[18] Id. at 1086.

[19] See O'Neill, supra note 15.

[20] Id.

[21] Id. at 1059.

[22] See Bredice, supra note 15 at 213, 216.

[23] Id.

[24] See Krattenmaker and Powe, supra note 15 at 1719, 1727-31.

[25] Id. at 1734-39.

[26] See Corn-Revere, supra note 15.

[27] Id. at 343.

[28] See Lively, supra note 15.

[29] Id. at 1091.

[30] See Katsh, supra note 15.

[31] Id. at 1687.

[32] Id. at 1716.

[33] Id. at 1717.

[34] See Sunstein, supra note 15.

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[35] 512 U.S. 622 (1994).

[36] See Sunstein, supra note 15 at 1760.

[37] New York Times v. Sullivan, 376 U.S. 254 (1964).

[38] Red Lion Broadcasting Co. v. FCC. 395 U.S. 367 (1969).

[39] Turner, 512 U.S. 622 (1994).

[40] See Sunstein, supra note 15 at 1765.

[41] See Branscomb, supra note 15.

[42] Id. at 1647.

[43] For more of an analysis of computer-mediated communication and community see generally STEPHEN JONES (ED.), CYBERSOCIETY: COMPUTER-MEDIATED COMMUNICATION AND COMMUNITY (1995); STEPHEN JONES (ED.), CYBERSOCIETY 2.0: REVISITING COMPUTER-MEDIATED COMMUNICATION AND COMMUNITY (1998).

[44] See Branscomb, supra note 15 at 1678.

[45] See Berman and Weitzner, supra note 15.

[46] Id. at 1620

[47] Id. at 1622.

[48] Id. at 1629.

[49] See Justin Brown, International Attempts to Curb Content in Cyberspace, paper presented at the "New Media, Free Speech: Challenges for the Future Conference," co-sponsored by the Mass Communication & Society Division of AEJMC and the School of Communications, University of South Florida, April 2-4, 1998.; See also Karen Sorrenson Silencing the Net — The Threat to Freedom of Expression On-line, 1 MONITORS 1 (1997) (visited March 10, 1998) <http://www.cwrl.utexas.edu/~monitors/1.1/index.html/>; A. Michael Froomkin ,The Internet as a Source of Regulatory Arbitrage, in BORDERS IN CYBERSPACE: INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE (Brian Kahin & Charles Nesson, eds. 1997); John T. Delacourt, Recent Development: The International Impact of Internet Regulation, 38 HARV. INT'L L.J. 207 (1997); Censorship on the 'Net; The View from Overseas, NETWORK WORLD, October 27, 1997 at 54.; See Robyn Forman Pollack, Creating the Standards of a Global Community: Regulating Pornography on the Internet — An International Concern, 10 TEMP. INT'L & COMP L.J. 467 (1996); Amy Kroll, Any Which Way But Loose: Nations Regulate the Internet, 4 TUL. J. INT'L & COMP L. 275 (1996); Chris Nerney, Net Freedom Limited Abroad, NETWORK WORLD, July 1, 1996 at 1.; Censorship Issues on the Internet Continue to Confuse Governments NEW MEDIA AGE, January 12, 1996 at 5.

[50] See Froomkin, supra note 49.

[51] Id.

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[52] See David R. Johnson and David Post, Law and Borders — The Rise of Law in Cyberspace, 48 STANFORD L. REV. 1367 (1996).

[53] See David Post, Anarchy, State and the Internet: An Essay on Law Making in Cyberspace, 1995 J. ONLINE L. art. 3, (visited Sept. 3, 1999)<http://www.law.cornell.edu/jol/post.html>

[54]See Lawrence Lessig, The Zones of Cyberspace, 48 STANFORD L. REV 1403, 1406 (1996).

[55]See Timothy Wu, Cyberspace Sovereignty? — The Internet and the International System, 10 HARV. J. LAW & TECH 647, 665 (1997).

[56] Henry H. Perritt, Jr., Jurisdiction in Cyberspace: The Role of Intermediaries in BORDERS IN CYBERSPACE: INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE (Brian Kahin & Charles Nesson, eds. 1997)

[57] See Sorrenson, supra note 49.

[58]Of course, this view is on the premise that access to new electronic media, like the Internet, will be made widely available to the public. For an overview of access inequities, see generally, National Telecommunications and Information Administration, Falling Through the Net: Defining the Digital Divide (visited October 10, 1999), available at <http://www.nita.doc.gov>;National Telecommunication Information Administration, Falling Through the Net II: New Data on the Digital Divide, (visited Oct. 8, 1999) <http://www.ntia.doc.gov/ntiahome/net2/falling.html>; Susan Goslee, Losing Bit by Bit: Low-Income Communities in the Information Age, (visited Oct 8, 1999) <http://www.benton.org/>.

[59] LEONARD LEVY, EMERGENCE OF A FREE PRESS (1985). No one really knows for sure what the writers of the First Amendment intended. According to Levy, our founding fathers did not have such an embracing acceptance of speech as often touted by scholars and theorists. Instead, Levy believes libertarian thought and the practice of freedom of expression did not occur until after the Sedition Act of 1798.

[60] See W.Wat Hopkins, The Supreme Court Defines the Marketplace of Ideas, 73 JOURNALISM & MASS COMM. Q. 40-53 (1996). Within the Federal Communications Commission, the marketplace of ideas metaphor has also been invoked in the regulation of communications, especially deregulatory efforts. see Philip M. Napoli, The Marketplace of Ideas Metaphor in Communications Regulation, 49(4) JOUR. OF. COMM., 151-169 (1999).

[61] JOHN MILTON, AEROPAGITICA (1644), reprinted (1895).

[62] Id. at 44.

[63] JOHN STUART MILL, ON LIBERTY (1859), reprinted (1956).

[64] Id. at 63-64.

[65]Abrams, 250 U.S. 616 (1919).

[66] JEREMY COHEN, CONGRESS SHALL MAKE NO LAW: OLIVER WENDELL HOLMES, THE FIRST AMENDMENT, AND JUDICIAL DECISION MAKING116 (1989).

[67] Abrams, 250 U.S. 616, 630-31 (1919).

[68] ADAM SMITH, WEALTH OF NATIONS (1776). Smith provides an explanation of laissez-faire and the

"invisible hand" theory supporting capitalism and free markets.

[69] See Lucas Powe, Scholarship and Markets, 56 GEO. WASH. L. REV. 172 (1987). Powe provides an interesting overview of First Amendment theory as it relates to markets while simultaneously supplying a critique of Owen Fiss and Jerome Barron.; Jerome Barron, Access to the Press — A New First Amendment Right, 80 HARV. L. REV. 1641 (1967). Barron encouraged the First Amendment to be used as an access vehicle to express underrepresented viewpoints in the mass media.; Owen Fiss, Free Speech and Social Structure, 71 IOWA L. REV. 1405 (1986). Fiss advocated the First Amendment be used in a manner that encouraged the "public debate principle" (robust political debate).

[70] TONY MCADAMS, LAW, BUSINESS & SOCIETY 264-65 (1995).

[71] See Powe supra note 69, at 172. As Powe points out, many academics agree that laissez-faire approach properly reigns in the marketplace of ideas

[72] For a critique of the Internet from a political economic, structuralist perspective, see ROBERT W. MCCHESNEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES, 119-185 (1999).

[73] Communications Decency Act of 1996 as contained in Title V, Sec. 502 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 133-35.

[74] A. Harmon, Landmark Online Decency Hearing Begins, LOS ANGELES TIMES, March 22, 1996 at D1.; L. Miller, Internet Indecency Act Goes to Court, USA TODAY, March 21, 1996 at 1D.

[75] ACLU v. Reno, 929 F. Supp 824, 832 (E.D. Pa. 1996) (fact 11).

[76] Id. at 836 (fact 34).

[77] Id at 838 (fact 48).

[78] Id. at 844 (fact 82).

[79] Id. at 842 (fact 74).

[80] Id. (fact 76).

[81] Id at 843. At the time of the hearings, the creation of a Web site would cost between $1,000-$15,000, with monthly operating costs depending on one's goals and the Web site's traffic. Commercial online services such as American Online allow subscribers to create Web pages free of charge (fact 76)."

[82] Id. at 832 (fact 12).

[83] Of course, costs for a computer, modem, software and internet access account must be absorbed for a user(s) to be a participant in cyberspace.

[84] Id. at 837 (fact 44).

[85] Id. at 843 (fact 79).

[86] Id. at 842 (fact 74).

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[87] Id. at 844-45 (fact 88).

[88] Id at 845 (fact 89).

[89] Implicit in the assumption is that citizenry is well-represented on the Internet. For an overview of access inequities, see supra note 58.

[90] Id. at 883.

[91] Reno v. ACLU, 521 U.S. 844 (1997).

[92] Id. at 885.

[93] Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231). For a good overview of COPA, including legislative history and the various arguments raised during injunction hearings. See Peter Jacobson, The Child Online Protections Act, Taming the World "Wide Web, 9 J. ART & ENT. L. 421 (1999)

[94] Many have termed COPA to be the second, but tamed reincarnation of the Communications Decency Act, specifically changing language to harmful to minors and attempting to make commercial pornography inaccessible to minors through the use of verification systems. See generally, Electronic Frontier Foundation, (visited April 20, 1999) <http://www.eff.org/pub/Legal/Cases/COPA/>.

[95] Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231)

[96] John Schwartz, U.S. Judge Blocks Law Curbing Online Smut, WASH POST, Feb. 2, 1999, at A2; Pamela Mendels, Setback for a Law Shielding Minors From Adult Web Sites, N.Y. TIMES, Feb. 2, 1999 at A12.

[97] ACLU v. Reno, 31 F. Supp. 2d 473 (E.D. Pa. 1999).

[98] Id. at 476.

[99] Id. at 480.

[100] ACLU v. Reno, 28 Media L. Rep. 1897 (3rd. Cir. 2000)

[101] Id. at 1929.

[102] Id. at 1902.

[103] Reno v. ACLU, 521 U.S. 844, 877 (1997).

[104] ACLU v. Reno, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999).

[105] For a theoretical view of how cultural studies may be applied to the law, see Robert Trager & Joseph A. Russomanno, "…The Whole Truth …": The First Amendment, Cultural Studies, and Comparative Law, 19 JOURN. OF COMM. INQUIRY 16-32 (1995); For a review of how social research may inform communication law and policy see JEREMY COHEN AND TIM GLEASON, SOCIAL RESEARCH IN COMMUNICATION AND LAW (1990).

[106] See generally ALAN SICA (ED.), WHAT IS SOCIAL THEORY?: THE PHILOSOPHICAL DEBATES (1998)

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[126] For excellent overviews of the Internet's affects on telecommunications law and policy see Werbach, note 1; INTERNATIONAL TELECOMMUNICATIONS UNION, CHALLENGES TO THE NETWORK: TELECOMMUNICATIONS AND THE INTERNET (1997).

[127] See Post, supra note 53; Froomkin, supra note 49.

[128] See ASPEN INSTITUTE, INTERNET AS PARADIGM (1997).

[129] Id.at viii-xi.

[130] For recent statistics on the digital divide, see National Telecommunications and Information Administration. Falling Through the Net: Defining the Digital Divide (visited October 10, 1999), available at <http://www.nita.doc.gov>

[131] While many debate over the existence of the public sphere, Jurgen Habermas believes the public sphere, specifically that of the classical bourgeois, was most developed in eighteen-century Europe. During this period, the public sphere was based primarily on the quality of argument and not on the status of participants. However, since this time, there has been a continual withdrawal from public participation and discourse. To Habermas, the quality of discourse and amount of participation help shape the nature of a public sphere in democratic society. See JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (1992).

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[107] See generally JORGE REINA SCHEMENT AND TERRY CURTIS, TENDENCIES AND TENSIONS OF THE INFORMATION AGE (1995).

[108] See generally WALTER ONG, ORALITY AND LITERACY: TECHNOLOGIZING OF THE WORD (1982).

[109] See generally ELIZABETH EISENSTEIN, THE PRINTING REVOLUTION IN EARLY MODERN EUROPE (1983).

[110] There are many theories embedded under the umbrella of postmodernism, See Robert Antonio, Mapping Postmodern Social Theory in WHAT IS SOCIAL THEORY?: THE PHILOSOPHICAL DEBATES 22-73 (Alan Sica ed.) (1998) The following section adopts one interpretation of postmodernist theory that is useful to describe cultural and technological characteristics of the Internet.

[111] See generally DAVID HARVEY, THE CONDITION OF POSTMODERNITY (1989).

[112] Considerable debate exists on how one views the self as capable of transformation within a postmodern condition. A more pessimistic vision is one of fragmentation, while ever-emergent represents a more optimistic outlook of continuous change. In part because of my personal view and for purposes of clarity I refer to the self as 'ever-emergent' in the rest of this section.

[113] See e.g., MICHEL FOUCAULT, THE ORDER OF THINGS (Vintage Books ed. 1994) (1971).

[114] See Richard Dyer, White, 29 SCREEN 44-64 (1988); Richard Dyer, Introduction, in THE MATTER OF IMAGE: ESSAYS ON REPRESENTATION 1-5 (1993).; bell hooks, Eating the Other: Desire and Resistance, in BLACK LOOKS: RACE AND REPRESENTATION 21-39 (1992).

[115] WILLIAM GIBSON, NEUROMANCER (1984).

[116] See Harvey, supra note 111 at 10.

[117] Id. at 11.

[118] Id. at 13.

[119] Id. at 16-17.

[120] See Elizabeth Reid, Virtual Worlds: Culture and Imagination, in CYBERSOCIETY: COMPUTER-MEDIATED COMMUNICATION AND COMMUNITY 164-183 (Steven Jones ed.) (1995).

[121] For an interesting perspective on how the establishment of "code" may establish governance of the Internet in lieu of traditional regulation, see generally LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).

[122] See Harvey, supra note 111 at 44.

[123] Id at 48.

[124] See Foucault, supra note 113 at 144.

[125] See supra note 58.

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# Contracting the News:

# A Study of Online News User Agreements

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## Abstract

### *Contracting the News:*
### *A Study of Online News User Agreements*

The terms of user agreements on news Web sites represent a new paradigm in the distribution of news. Rather than selling news to readers, today's online publishers provide content in exchange for agreement to the conditions of a user agreement. This study examines the provisions in online news user agreements. It finds that such agreements threaten the free flow of information by duplicating or exceeding protections provided by copyright law and will be strengthened by new Uniform Commercial Code legislation.

Your Sunday newspaper arrives in its usual plastic bag, but today you notice something different: the bag is sealed by tape and through the plastic, a warning cautions that breaking the seal will signify your consent to the following provisions:

> •This newspaper is intended for your personal, noncommercial use.
>
> • You may not modify, publish, transmit, reproduce, create new works from, distribute, perform, display or in any way exploit the content.
>
> •This newspaper does not represent or endorse the accuracy or reliability of the content, nor does it guarantee timely delivery.

Although it is unlikely your newspaper will arrive "shrinkwrapped" any time soon, the contracting of news and information is a growing phenomenon.[1] Of the nation's 1,489 daily newspapers, more than 950 have Internet news sites,[2] the majority of which come with user agreements. User agreements are contracts that specify the conditions under which a user may read news, look up stock quotes, browse news photos, and participate in interactive news chat rooms.

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[1] "Shrinkwrapping" is a reference to the plastic covering of software packages and the written licenses for use of the product that become effective as soon as the customer tears the plastic covering. Its cousin, "webwrapping," refers to the user agreement licenses on Web sites, usually found at the bottom of most home pages in small type. Scholars have argued that such licenses deny consumers an opportunity to review products before agreeing to the terms of their use, thereby redefining the standard offer and acceptance provisions of contract law. *See* Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property*, 87 CALIF. L. REV. 111 (1999).

[2] Newspaper Association of America, *Facts About Newspapers* (visited Dec. 4, 1999) <http://www.naa.org>.

The contracting of news on the Web represents a fundamental shift in the way consumers receive their news. Rather than engaging in a traditional sale of information — in which the publisher receives payment for a printed newspaper — today's online news publishers provide free content in exchange for tacit agreement to an online user agreement. Under such agreements, news consumers no longer purchase a tangible newspaper; they are given a limited license to access news content, provided they play by the rules.

Scholars argue that such provisions violate existing copyright law by restricting the reuse of materials that are either in the public domain or protected by the fair use doctrine.[3] They also express concern that such contracts run the risk of "preempting" federal copyright law, which is prohibited.[4] And they fear that such agreements aren't agreements at all. With provisions that demand acceptance before a consumer has an opportunity to review the product, the agreements "redefine what constitutes a contract."[5]

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[3] The doctrine of fair use, adopted from English common law and enacted into law by Congress in 1976, governs the use of a first author's work by a subsequent author without the former's consent. The factors for determining fair use are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *See* U.S.C. §107 (1990).

[4] Preemption is a "doctrine adopted by the U.S. Supreme Court holding that certain matters are of such a national, as opposed to local, character that federal laws preempt or take precedence over state laws. As such, a state may not pass a law inconsistent with the federal law." BLACK'S LAW DICTIONARY 1177 (6th ed. 1990). Section 301 of the federal Copyright Act, the preemption clause, prohibits any "legal or equitable rights (under state law) that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103."

A 1996 Seventh Circuit Court of Appeals decision, *ProCD, Inc. v. Zeidenberg*,[6] has had a major impact on the debate. That decision upheld the use of a shrinkwrap license and ruled that such contracts do not preempt federal copyright law. ProCD, a manufacturer of computer software, compiled information from more than 3,000 directories into a telephone book database called SelectPhone. The database contained approximately 95 million listings that were marketed to commercial and private users. Matthew Zeidenberg bought a private user package, but violated the shrinkwrap license by using the listings for a database he constructed and made available over the Internet.

ProCD sued Zeidenberg for copyright infringement and breach of the shrinkwrap license agreement. Zeidenberg argued the terms of the license were not enforceable because he did not agree to them and was unable to review them before using the product. The district court ruled in Zeidenberg's favor, stating that shrinkwrap licenses whose terms are hidden inside the box are unenforceable. The district court also ruled that the contract was a violation of copyright law under the preemption clause.

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[5] Lemley, *supra* note 1, at 119.

[6] 86 F.3d 1447 (7th Circuit 1996).

But the Seventh Circuit court reversed, holding that the shrinkwrap license was enforceable. The court said that even though Zeidenberg was unaware of the terms of the agreement until after the sale was made, the contract was valid because he had agreed to the terms of the license by his conduct. In essence, his purchase of the software constituted his consent to the agreement.

In a response that may strengthen the *ProCD* decision, the drafters of the Uniform Commercial Code[7] have proposed the Uniform Computer Information Transactions Act (UCITA), also known as Article 2B.[8] Article 2B would lend further support to shrinkwrap and user agreements by specifying standards for such agreements, placing more power in the hands in the copyright holder. Although Article 2B calls for an opportunity for users to review contract terms, it does not require a formal acknowledgment of the terms.[9]

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[7] The Uniform Commercial Code was enacted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) "to bring a greater level of certainty and predictability to an increasingly national commercial system. … In many ways the UCC seeks primarily to give state sanction to private rules developed by merchants." The UCC details the rules of proper commercial conduct. It has been enacted in every state except Louisiana, as well as the District of Columbia and the Virgin Islands. The primary UCC statute is called Article 2. *See* CLAYTON P. GILLETTE AND STEVEN D. WALT, SALES LAW: DOMESTIC AND INTERNATIONAL 1 (1999).

[8] Article 2B seeks to establish "uniform rules for the intangible subject matter involved in computer information transactions on the Internet and elsewhere," covering contracts in computer information. Among the provisions the 211-page proposed law addresses: (1) Digital signatures and adequate consent to a contract; (2) Warranties attached to digital products; (3) Choice-of-law rules in Internet transactions; (4) Handling of damages, releases, refunds and inspection of digital products. Article 2B was recently adopted by the Virginia state legislature, to the dismay of many intellectual property scholars. *See* Carlyle C. Ring, Jr., & Raymond T. Nimmer, *Series of Papers on UCITA Issues* (visited Nov. 4, 1999) <http://www.nccusl.org>.

[9] Under the U.C.I.T.A., a user "manifests assent" to a contract if he "intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term." *See* U.C.I.T.A. §112 (a)(2).

The increasing popularity of these user agreements creates new issues for both the Web site producer and his audience. The purpose of this paper is to explore the changing nature of access to news by examining the specific provisions of online news user agreements and the potential impact on news consumers in the wake of *ProCD* and the UCITA proposal. The trend toward licensing access to news may have the effect of limiting the fair use and free flow of information in a way previously unseen in the distribution of news.

## Literature Review

Most scholars were disturbed by the court's decision in *ProCD*, and most objected to the standards proposed in Article 2B. A search of the literature on the court's decision and the Article 2B proposal revealed 38 scholarly articles within the last two years, most fearing that such agreements alter the balance of copyright law in the copyright holder's favor.

Scholars point to three problems with *ProCD* and Article 2B. First, scholars say both undermine the marketplace of ideas and the free exchange of information. Secondly,

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by "allowing software developers to contract beyond the scope of copyright," such decisions and legislation fail "to recognize that Congress, not developers, should strike the appropriate balance between proprietary rights and freedom of information," a clear violation of the preemption clause in Section 301 of the Copyright Act.[10] Finally, neither the *ProCD* court nor Article 2B leaves an opportunity for the average online user to negotiate the terms of his use.

Michael J. Madison fears the loss of "open space," in which ideas and facts are freely exchanged without conditions placed on their use. He wrote that *ProCD* serves to reshape conventional understandings regarding copyright and information rights. He said, "If modern copyright and information law is in large part a battle of metaphors, then we need to develop and implement a process that prevents legal-ware in the information landscape from eliminating our intellectual open space."[11]

Scholars maintain that Article 2B will further privatize American copyright law.[12] Lemley examined several common shrinkwrap provisions that contribute to privatization.[13] These include:

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[10] Brian Covotta & Pamela Sergeef, *Intellectual Property: a)Copyright: 1. Preemption: b)Contract Enforceability: ProCD, Inc. v. Zeidenberg*, 13 BERKLELEY TECH L.J. 35, 41-42 (1998).

[11] Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025, 1034 (1998).

[12] Charles McManis, *The Privatization (or "Shrink-Wrapping") of American Copyright LAW*, 87 CALIF. L. REV. 173 (1999).

[13] Lemley, *supra* note 1, at 128-132.

- Prohibiting copies. Copyright law allows for copies under specific circumstances, including copies of computer programs.

- Prohibiting reverse engineering, a process by which the original components or source code of a program are identified. Copyright law permits reverse engineering under special circumstances.

- Prohibiting the transfer or sale of a program or database. Such provisions may conflict with the "first sale" doctrine in copyright law, which gives the owner the right to sell that copy without permission from the author. Article 2B addresses this issue directly by forbidding such a "first sale," and in effect, threatens the livelihood of software and hardware resellers.[14]

- Prohibiting the work from being performed or displayed to the public under any circumstances. Again, such provisions conflict with sections of the copyright act that allow certain performances.

David Nimmer, Elliot Brown, and Gary Frischling conceded that ProCD was not the first copyright holder to attempt to magnify his rights by contract. But they were nonetheless troubled by the court's decision to ignore ProCD's attempt to monopolize the factual listings of a telephone book — listings that a unanimous Supreme Court in 1991 said were in the public domain.[15] Furthermore, the authors said the logic of *ProCD* grants

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[14] "This is basically RapeThe Consumer.com," charges Chuck Schentz, president of Weirdstuff Warehouse, based in California. Schentz was interviewed about Article 2B in MicroTimes magazine. "I'm not going to be able to sell, and they're not going to be able to buy, used software. It kinda kills the aftermarket for anything new – software, computers." He likens the proposal to outlawing a used book or record store. *See* Chris Barnett, *Resellers, Users in the Crosshairs* (visited Nov. 15, 1999) <http://www.microtimes.com/198/industry.html>.

[15] David Nimmer, Elliot Brown & Gary N. Frischling, *The Metamorphosis of Contract into Expand*, 87 CALIF. L. REV. 17, 48 (1999). In *Feist*, the U.S. Supreme Court ruled that a publisher's use of the listings in a telephone company's directory was protected because the listings were in the public domain and the arrangement of the listings in the phone directory was not sufficiently original to warrant copyright

"complete control" to copyright holders, a monopoly right that courts previously have refused to allow:

> Publishers who follow the logic of *ProCD, Inc. v. Zeidenberg* may amplify their statutory rights simply by wrapping books in cellophane, subject to the limitation that the buyer is barred from passing the purchased copy on to a friend. Nor is there any reason that the publisher should stop there. It could likewise require the reader not to skip chapters, not to read any paragraphs more than three times, not to reveal the surprise plot twists to family or acquaintances, and certainly not to quote in a book review the few short excerpts that the fair use doctrine would otherwise permit.[16]

On the question of whether shrinkwrap licenses and user agreements preempt federal copyright law, Mark A. Lemley and Charles McManis examined the murkiness of the Copyright Act's preemption section, citing its varying interpretations by lower courts. Nimmer, Brown, and Frischling wrote that copyright is "structured at every turn" by contracts governed by state law and so preemption questions are inevitable. Because the rights guaranteed by federal copyright law are not explicit, the authors argued, states are left to determine the specific nature of ownership. Thus, states "play a critical role in maintaining the delicate equilibrium between the rights of copyright holders to reap the

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protection. The Court re-emphasized that facts and data are free to be exchanged because "they do not owe their origin to an act of authorship" and "do not magically change their status when gathered together in one place." *See* Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 345 (1991).

[16] *Id*. at 55.

rewards of their intellectual property and the rights of the public to unimpeded advancement of knowledge and expression."[17]

Lemley maintained the question of preemption is not an all-or-nothing determination. He wrote: "The issue is not the relatively simple one of whether to pre-empt a particular state statute, but the more complex one of whether and how to preempt certain parts of contract law without bringing down the whole edifice."[18] Lemley said courts strike a balance on the preemption question by evaluating state laws on a case-by-case basis to determine whether "they impermissibly operate in any given situation to create a state right equivalent to copyright."[19]

Brian Covotta and Pamela Sergeef argued that *ProCD* "significantly expanded the enforceability of contracts and constricted federal preemption."[20] The authors wrote that the court erred in its interpretation of the three pre-emption cases[21] on which it based its ruling because the facts in each of those cases were different from the facts of *ProCD*:

> Each involved a negotiated contract between two parties, not a mass-market shrinkwrap license. This distinction is critical to the section 301 analysis because courts have held that the extra element that removes a state law claim from federal

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[17] *Id.* at 26.

[18] Lemley, *supra* note 1, at 137.

[19] *Id.* at 140.

[20] Covotta & Sergeef, *supra* note 10, at 48.

[21] *See* National Car Rental System, Inc. v. Computer Associates International, Inc., 991 F.2d 426 (8th Cir. 1993); Taquino v. Teledyne Monarch Rubber, 893 F.2d 1488 (5th Cir. 1990); and Acorn Structures, Inc. v. Swantz, 846 F.2d 923 (4th Cir. 1988).

> preemption must change the nature of the action so that it is qualitatively different from a copyright infringement claim.[22]

The authors wrote that the Seventh Circuit failed to establish that difference because Zeidenberg never negotiated his contract with ProCD.

Also criticized in the literature is Article 2B's assumption that the purchase of software is a license and not a sale. Scholars argue the transaction is more sale than license because the buyer and seller do not formally meet to construct the terms of their agreement and because sales tax is paid, the same as in a traditional sales setting.[23] Furthermore, scholars find the acceptance of such terms — after payment but before the use of the product and as soon as the shrinkwrap is broken — to be unreasonable. Covotta and Sergeef labeled it a "imbalance in bargaining power" that "leaves the shrinkwrap licensing system open to abuse."[24]

Supporters of Article 2B – primarily large software manufacturers — argue there are strong incentives for licensors to obtain the licensee's consent. They also maintain there are outlets for licensees to express their views on possible problems with the proposed law. Robert W. Gomulkiewicz, an attorney for Microsoft, observed that software users have formed associations to monitor and influence software license terms.[25] He noted that industry information research organizations and the trade press will be quick to "sound the alarm" when a provision adversely affects end users.[26] He also wrote that the "market will punish those who employ harsh terms" by taking advantage of consumer protection and unconscionability laws.[27]

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[22] Covotta & Sergeef, *supra* note 10, at 48.
[23] McManis, *supra* note 12, at 174.
[24] Covotta & Sergeef, *supra* note 10, at 43.

But such arguments provide little comfort to scholars who see these unsettled areas of contract law as an imminent threat to the free flow of ideas in a digital environment:

> We are approaching, if we have not already achieved, a point where books, magazines and commercial television programs can be regularly accessed only after acknowledging some form of "user" agreement. The blunt reality of *ProCD* says, in effect, that regardless of what the Copyright Act may provide as a matter of public policy, such practices are at least acceptable, and perhaps encouraged.[28]

Thus, *ProCD* and Article 2B have enormous implications for the news industry, whose livelihood depends upon the fair use provisions of copyright law for the gathering and reporting of news and the protections offered by copyright law for its own unique presentation of the news. While the literature addresses the impact of *ProCD* and legislation such as Article 2B on user agreements in general, it does not specifically address their impact on news Web sites.

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[25] Robert W. Gomulkiewicz *The License is the Product: Comments on the Promise of Article 2B for Software and Information Licensing*, 13 BERKELEY TECH. L.J. 891, 899 (1998).

[26] *Id.* at 901. One example of such a response was the July 1999 protest over a new user agreement issued by Yahoo to its newly acquired GeoCities service customers. GeoCities customers boycotted Yahoo after the search engine attempted to claim ownership of works created by GeoCities' customers on Web pages hosted by the new service. Yahoo eventually withdrew its claim. *See also* Sandeep Junnarkar, *Yahoo Relents on GeoCities Terms* (visited Dec. 4, 1999) <http://news.cnet.com/news0-1005-200-344341.html>.

[27] *Id.* Unconscionability is a "doctrine under which courts may deny enforcement of unfair or oppressive contracts because of procedural abuses arising out the contract formation, or because of substantive abuses relating to terms of the contracts, such as terms which violate reasonable expectations of parties or which involve gross disparities in price." BLACK'S LAW DICTIONARY 1524 (6th ed. 1990).

[28] Madison *supra* note 11, at 1028-1029.

## Research Questions, Methodology and Limitations

This paper will address four research questions:

- What are the common provisions contained in online news user agreements?
- Do those provisions conflict with existing copyright law, and if so, how?
- What effect might Article 2B have on the use of online news user agreements?
- What are the implications for news organizations?

This study analyzed the content of 20 online news user agreements during September and October 1999. The online news sites of the top ten U.S. newspapers were selected,[29] as well as the ten most-visited news, information and entertainment sites as ranked by Mediametrix, a leading company in Internet user measurement.[30] By analyzing the user agreements of both traditional and more popular news providers, it was hoped that a somewhat representative sample of online news sites might be achieved. The agreements were read and sorted into one of four content categories:

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[29] The source for this list was The Associated Press. The newspapers were ranked by circulation. The list excludes The Wall Street Journal, which requires users to pay a membership fee to access its site.

[30] See <http://www.mediametrix.com>. Those sites selected included only those able to be accessed on the Internet, thereby excluding various America Online sites. There is no overlap between the two categories, an indication that print news consumers either seek different news providers online or possibly don't seek their news online at all.

- Basic contract issues, including general conditions of use, choice of law,[31] and the right to change or terminate the agreement.
- Copyright issues, including copying, redistribution, derivative works, and "deep linking," the practice of linking to content deep within the news site.
- Warranties and limitations of liability, including indemnification,[32] accuracy, errors, viruses, and third-party information; and
- Interactive issues, including user conduct in chat rooms, solicitation, and impersonation.

Analysis was limited to news sites to examine the specific problems and unique conflicts created by the court's decision in *ProCD* and the adoption of Article 2B for the news industry.

## Findings and Analysis

The ten most-visited news, information, and entertainment sites in the study included About.com, CNET, Digitalcity, Disney.com, ESPN.com, MSNBC.com,

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[31] Choice of law determines what law should govern in legal conflicts. Most online user agreements specify that the laws of the state in which a company's headquarters is located will apply to any litigation. BLACK'S LAW DICTIONARY 241 (6th ed. 1990).

[32] Indemnification protects the officers and directors of companies who are named as defendants in litigation relating to corporate affairs. "In some instances corporations may indemnify officers and directors for fines, judgments, or amounts paid in settlement as well as expenses." BLACK'S LAW DICTIONARY 769 (6th ed. 1990).

Pathfinder, Sportsline, ZDNet, and weather.com. The ten largest traditional news sites in the study included the Boston Globe, Chicago Tribune, Daily News Online, Dallas Morning News, HoustonChronicle.com, latimes.com, Newsday.com, The New York Times, Washington Post and USA Today. The Mediametrix ranked sites — those in the "most-visited" category — are admittedly of a broader variety than the traditional sties, encompassing more general information and entertainment information. Indeed this larger grouping of media sites seems to indicate a general trend toward measuring the combination of information and entertainment usage for the benefit of advertisers looking to reach the largest audience. Of all 20 sites, only the Dallas Morning News lacked a user agreement.

The user agreements of the remaining 19 sites were categorized into the four subject areas (basic contract issues, copyright, warranties and liability and interactive rules) and compared within and across categories. The study confirmed scholars' concerns that such contracts privatize copyright law by redefining and/or expanding existing law for the copying and redistribution of copyrighted works. The study also confirmed scholars' concerns that the use of a site is an agreement to its terms. Furthermore, the study revealed that the user agreements were likely to contain provisions limiting provider liability for content errors, and in those sites that ran interactive forums, also limited expression. These findings appear to contradict the news policies and practices of traditional news organizations.

## Basic Contract Issues

Basic contract issues were defined as those specifying the general conditions for use of the site, including choice of law, the right to change or terminate the agreement and the length of the contract. Four traditional news site user agreements failed to stipulate any of these provisions.[33] CNET was the only most-visited site not to include these basic contract elements.

Of those traditional and most-visited sites addressing basic contract issues, 13 sites stated that using the site was an acknowledgment of the terms of the contract. Interestingly, the most-visited sites were more likely to include this provision (8 of 10 sites) than the traditional news sites (5 of 10 sites), possibly indicating a greater familiarity with legal issues surrounding user agreements. Thirteen of the 19 user agreements studied also stipulated the forum for litigation ("laws of state apply"). These findings support Article 2B's "manifest assent" policy — that visiting a site is enough to infer that the user assents to the terms of the agreement and no signature is required — and confirm scholar concerns that users lack the opportunity to review the terms of use before using the product.

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[33] These included Daily News Online, the Boston Globe, USA Today and the Dallas Morning News.

Most news user agreements were found by clicking small type at the bottom of the site's home page. Article 2B calls for "the opportunity to review a record or term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review."[34] Whether the small type constitutes a "manner that ought to call it to the attention of a reasonable person" is not clear. Certainly the comfort level of the user and his familiarity with the site and the Internet in general are at issue in this determination. In 1991, the U.S. Supreme Court in *Carnival Cruises, Inc. v. Shute* ruled that a forum-selection clause specified in small type on the tickets of two cruise passengers was enforceable even though it was "not freely bargained for."[35] Although the Court's opinion did not address the issue of whether the passenger's attention was called to the clause, the Court said:

> Respondents' passage contract was purely routine and doubtless nearly identical to every commercial passage contract issued by petitioner and most other cruise lines. In this context, it would be entirely unreasonable for us to assume that respondents — or any other cruise passenger — would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line.[36]

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[34] U.C.I.T.A. §112(e)(1).
[35] 499 U.S. 585 (1991).
[36] *Id.* at 593.

In his dissent in *Carnival*, Justice Stevens questioned whether the passengers were "fully and fairly notified" about the existence of the choice of forum clause:

> I begin my dissent by noting that only the most meticulous passenger is likely to become aware of the forum-selection provision. I have therefore appended to this opinion a facsimile of the relevant text, using the type size that actually appears in the ticket itself. A careful reader will find the forum selection clause in the 8th of 25 numbered paragraphs.[37]

Thus, it is not clear whether the basic contract issues outlined in news user agreements violate the spirit of Article 2B, or whether like *Carnival*, it is impractical for news users to expect an opportunity to bargain for the terms of their use.[38]

Copyright Issues

Both traditional and the most-visited news providers are concerned about protecting their copyright. Every site with a user agreement in the study called for either the prohibition of copies and/or the restriction of copies to "personal use only." Redistribution, retransmission, and trademark infringement were also commonly prohibited. Typical of these provisions were *The New York Times'* requirements:

> You may not modify, publish, transmit, participate in the transfer or sale of, reproduce, create new works from, distribute, perform, display, or in any way exploit, any of the Content or the Service (including software) in whole or in part. You may download or copy the Content and other downloadable items displayed on the Service for personal use only,

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[37] *Id.* at 597.

[38] An exception to this may be found in news site interactive forums, in which some users are asked to click "I agree" to the terms of their participation in the forum. However, even with a "clickwrap" agreement, there is still no opportunity for negotiating the terms of use.

> provided that you maintain all copyright and all other notices contained therein. Content for other than personal use is expressly prohibited without prior written permission from The New York Times Rights and Permissions Department, or the copyright holder identified in the copyright notice contained in the Content.[39]

Several findings support scholars' concerns that such agreements may prohibit the use of facts in the public domain or permit an end-run around fair use exceptions. Traditional news providers were more likely to prohibit the alteration or creation of derivative works than the most-visited sites (7 to 5). In 1994, the U.S. Supreme Court broadened fair use by ruling that derivative works that add "something new, with a further purpose or different character, altering the first with new expression, meaning or message" are permissible under copyright.[40] The Court's willingness to broaden fair use may account for the traditional news market's desire to restrict user rights by contract. But the ability of new technology to easily redistribute and alter news content is perhaps the industry's greatest fear and motivating factor behind these user restrictions.

Other restricted uses included database construction, deep linking and framing. Of those that restricted database construction, only the Houston Chronicle emphasized that the restriction applied to the site's copyrighted material — not to the facts of news that lay in the public domain.

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[39] *Subscriber Agreement*, The New York Times on the Web (visited Sept. 18, 1999) <http://www.nytimes.com/subscribe/help/agree.html>.

Restrictions on deep linking attempt to prohibit other sites from linking to pages deep within a news organization's site, bypassing its home page. Framing restrictions prohibit users from placing their ads or other content around the provider's content, thereby "framing" the provider's copyrighted material. Both practices are controversial and have only recently been brought before the courts.[41] Not surprisingly, both practices are prohibited by the Washington Post.[42] Only the Chicago Tribune joined the Post in specifically prohibiting deep linking and framing.

## Warranties and Limitations on Liability

Liability was the third area articulated in both traditional and most-visited news user agreements. For both types of news providers, liability is a critical issue. Not only do most agreements call for provider indemnification (15 of 19 sites), but the majority specify protection from errors (16 sites), problems with third party content (13 sites), delays (12 sites), damages and losses (12 sites), and viruses (11 sites). Other items cited

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[40] Campbell v. Acuff-Rose, 510 U.S. 569, 579 (1994).

[41] In Ticketmaster Corp. v Tickets.com Inc., the district court ruled that user agreements may effectively prohibit deep linking. The ruling, however, is the subject of some debate among analysts. See Carl S. Kaplan, ***Legality of Deep Linking Remains Deeply Complicated***, (visited June 21, 2000) <http://www.nytimes.com/library/tech/00/04/cyber/cyberlaw/07law.html>.

[42] The Washington Post in 1997 sued Total News, a Web site that took news content from the Post by "framing" it. The Post eventually reached a settlement with Total News, which agreed not to frame the Post's site. The Post is currently suing the Free Republic, whose site, freerepublic.com, has posted thousands of copies of the paper's articles on its site. *See* Greg Miller, *Judge Rejects 'Fair Use' of News Protection*, Los Angeles Times (visited Nov. 9, 1999) <http://www.latimes.com>.

include indemnification from faulty equipment (3 sites), inaccurate stock listings (1 site), and/or problems with passwords (1 site).

Disney.com's user agreement was typical:

> Disney does not warrant that the functions contained in the materials will be uninterrupted or error free, that defects will be corrected, or that this site or the server that make it available are free of viruses or other harmful components. Disney does not warrant or make any representations regarding the use or the results of the use of the materials in this site in terms of their correctness, accuracy, reliability, or otherwise.[43]

Two sections of Article 2B address liability issues, including warranties (section 4) and performance (section 6). Specifically, section 404 of Article 2B supports protections against the inaccuracies of "published informational content," which is defined broadly as "informational content prepared for or made available to recipients generally, or to a class of recipients, in substantially the same form."[44] In supporting documentation on the NCCUSL's Web site, published information content is defined as news:

> This is the information we read, listen to, enjoy and communicate. It is the content of digital newsletters, multimedia encyclopedias, and online databases. This is the material of the First Amendment. It is published and made available generally, in contrast to the type of information that a consultant or lawyer provides for its specific client.[45]

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[43] *Terms and Conditions of Use*, Disney.com (visited Oct. 30, 1999) <http://disney.go.com/legal/conditions_of_use.html?clk=8884>.

Thus, Article 2B promises to protect online news providers from inaccuracies and errors on their sites. But such indemnification raises new questions about the news media's approach to delivering quality news reports. Why would the news media claim protection from errors in their online report but not also in their printed or broadcast product? Is it because making such a public claim would erode the public's trust? Common practice and the ethical codes of journalism organizations require the correction of errors.[46] These online provisions are poised to sour the stomachs of a public that already mistrusts the media.[47]

Interactive Issues

Provisions for regulating interactive news forums varied in accordance with the interactive nature of the sites studied. Not surprisingly, the most-visited news sites offered more interactive options, which in turn prompted the inclusion of more restrictions in their user agreements.

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[44] U.C.I.T.A. §102(51).

[45] Ring & Nimmer, *supra* note 8.

[46] The Society of Professional Journalists Code of Ethics says journalists should "test the accuracy of information from all sources and exercise care to avoid inadvertent error." The code also asks journalists to "admit mistakes and correct them promptly." *See Society of Professional Journalists Code of Ethics* (visited Dec. 4, 1999) <http://spj.org/ethics/code.htm>.

[47] A 1999 study by the American Society of Newspaper Editors reported that "small errors undermine public confidence in the press. …As far as the public is concerned, there's no excuse for errors." That same study reported that 63 percent of readers "felt better about the quality of news coverage they get when they see corrections." *See* Christine D. Urban, *Examining Our Credibility: the Public and the Press* (visited Dec. 4, 1999) <http://www.asne.org/kiosk/reports/99reports/1999examingourcredibility/>.

Eleven sites stated that they would monitor chat room discussions, but were not obligated to do so. Another 10 sites claimed ownership of any information posted in such forums and the right to disclose such postings, clearly another indication of a provider end-run around copyright law. Nine sites warned against solicitation and advertising in such forums, and 13 sites warned against the use of defamatory or obscene language. Typical of these was CBS's Sportsline.com:

> CBS Sportsline also prohibits all inappropriate language, comments, remarks and images ("Content"), including but not limited to Content which is: Offensive, obscene, vulgar, abusive, unlawful, racial, defamatory, harassing or otherwise objectionable in CBS SportsLine's sole discretion; and/or Harmful or threatening or which infringes upon the rights of others. CBS SportsLine will not tolerate any Content or conduct that restricts or inhibits other users from using or enjoying forums or chat rooms. CBS SportsLine reserves the right, in its sole and absolute discretion, to determine the appropriateness of all Content or conduct.[48]

These findings again support scholars' concerns that contracts are covering ground already covered by state and federal statutes. In SportsLine's case, it may be argued that such provisions exceed such protections. While state law punishes defamatory speech, it appears CBS's contract takes such protections one step further by restricting "offensive" speech that may or may not be defamatory.

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[48] *Terms and Conditions*, CBS Sportsline (visited Oct. 30, 1999) <http://cbs.sportsline.com/u/chat/chatauth/terms.html>.

## Conclusion

This study offered evidence that a new paradigm has emerged in the relationship between news provider and news consumer. The growth of online news user agreements establishes a new relationship in which a publisher licenses news instead of selling it. This study showed that the provisions of such agreements set the terms for the relationship by defining the method of agreement, choice of law and the length of the contract. The agreements also cover issues of copyright, warranties, liability and interactivity.

The findings of this study support scholars' concerns that such agreements are unnecessarily repeating, preempting and redefining established law, most notably the law of copyright. Indeed, every site with a user agreement in the study called for either the prohibition of copies and/or the restriction of copies to "personal use only." Furthermore, the study showed that the use of a site was an agreement to its terms for use, regardless of whether the user read or agreed to the terms. By enforcing online agreements, news organizations come dangerously close to defining the terms for access to the news and limiting the very free flow of ideas they seek to protect.

Passage of Article 2B also presents a unique dilemma for news organizations. For news gatherers, the contracting of news and information as envisioned by Article 2B presents a threat to the free flow of information for reporting and investigative work. At the same time, online publishers — including many traditional newspaper publishers with online news sites — have legitimate concerns about the misuse of their content on the Internet. User agreements offer an additional means of protection against such theft, and Article 2B promises to serve as reinforcement. But the support of these measures appears to contradict longtime news values of openness and public service. As the courts begin to wrestle with these issues, online publishers will need to reflect on these competing interests, and reconsider where they stand.

# Libel in 48 Point:
## How Courts Have Ruled Since *Sullivan* on Allegedly False and Defamatory Headlines Atop Accurate Stories

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## Abstract

The U.S. Court of Appeals for the Ninth Circuit ruled in late 1998 that a headline could be actionable for libel on its own, even when the story to which it referred was substantially accurate. This no doubt pleased the plaintiff in the case, actor Brian "Kato" Kaelin, a witness in O.J. Simpson's murder trial, who sued the tabloid *National Examiner* over the headline "Cops Think Kato Did It." It also highlighted the fact that some courts consider the effect of allegedly libelous headlines to be mitigated by accompanying accurate stories while others do not. To determine whether the *Kaelin* ruling was part of a trend, this paper examines 23 cases in which plaintiffs sued over allegedly libelous headlines accompanying accurate stories. It shows that since 1964, courts have been most likely to consider headlines in context, using one of two similar common law approaches: the unit approach or the "fair index" rule. The paper also discusses expansion of use of the "fair index" rule, which is somewhat tougher on media defendants than the classic unit approach; reviews the Ninth Circuit's reasoning for its decision in *Kaelin*; and discusses implications of that ruling for headlines that are not adjacent to the stories to which they refer.

## *Kaelin v. Globe* raises questions

"Cops Think Kato Did It!" blared a headline on the front page of a supermarket tabloid a week after a criminal court jury found O.J. Simpson not guilty of killing his ex-wife and one of her friends.[1] "Kato," of course, referred to actor Brian "Kato" Kaelin, who had lived in a guesthouse on Simpson's property and testified during his trial. There was disagreement, however, over what "it" meant. Kaelin thought the pronoun referred to the murders of Nicole Brown Simpson and Ronald Goldman. He asked the *National Examiner* to print a retraction.[2] The tabloid, however, maintained that a front-page subheadline and the story, which began on page 17, made it clear that "it" referred to "perjury," the crime some of Kaelin's friends reportedly thought police suspected the actor of committing.[3] The *National Examiner* refused to publish a correction.

When Kaelin sued, charging that the main headline libeled him even though the story and subhead were substantially correct,[4] the U.S. District Court for the Central District of California faced this question: Should an allegedly defamatory headline accompanied by accurate material be considered in context of that material, or should it be actionable on its own?

U.S. District Judge Dickran Tevrizian considered the main headline in context of the accurate subhead and ruled that Kaelin, who conceded he was a public figure, had failed to show that a jury might find that the *National Examiner* had acted with actual malice.[5] Tevrizian granted summary judgment for Globe Communications Corp., owner of the *National Examiner*.[6]

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[1] Kaelin v. Globe Communications Corp., 162 F.3d 1036, 1038, attachments 1044-1045 (9th Cir. 1998).

[2] *Id.*

[3] *Id.* at 1037-1038, attachments 1044-1045 (9th Cir. 1998). The front-page subheadline read "He fears they want him for perjury, say pals." The story on page 17 began: "Kato Kaelin is still a suspect in the murder of Nicole Brown Simpson and Ron Goldman, friends fear. They are worried that LAPD cops are desperately looking for a way to put Kato behind bars for perjury. 'We're sure the cops have been trying to prove that Kato didn't tell them everything he knows, that somehow he spoiled their case against O.J.,' says one pal. 'It's not true, but we think they're out to get even with Kato.'"

[4] *Id.* at 1039.

Kaelin then appealed to the U.S. Court of Appeals for the Ninth Circuit, which viewed the case differently. Even if the story was assumed not to be defamatory,[7] Judge Barry G. Silverman wrote, a jury could find that "the headlines are defamatory, and that the Globe's editors acted with actual malice in their decision to run a headline from which a reasonable juror could conclude that Kaelin was a murder suspect."[8] In a decision that *Legal Times* called "startling,"[9] the appeals court reversed Tevrizian's decision 3-0 on December 30, 1998, and remanded the *Kaelin* case for trial.

Kaelin settled out of court in late 1999 for an undisclosed sum.[10] Still, his case illustrates the disagreement among courts on how to approach allegedly defamatory headlines that refer to accurate stories. In an effort to determine which approach is prevalent and whether the "startling" ruling in *Kaelin* was part of a trend, this paper reviews headline libel opinions issued during the past 35 years, since *New York Times v. Sullivan* constitutionalized libel law.

This study is important because it sheds new light on an area that has financial implications for the media. According to attorney and libel expert Bruce W. Sanford, false headlines are among five types of news reports most likely to provoke libel lawsuits.[11] If such cases reach trial, they can be costly for media defendants. A study of the outcomes of actual malice cases decided between 1974 and 1984 found that 29.4 percent of those involving inaccurate or misleading headlines were won by plaintiffs.[12] As Deckle McLean wrote in 1989, "[M]istakes in headlines are probably more likely to cause trouble for newspapers than mistakes in news articles. Errors on heads are more likely to be noticed: when noticed, less likely to be forgiven or ignored by those affected; when made the basis of lawsuits, less likely to be excused in court."[13]

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[5] The level of fault public figures must prove to prevail in libel lawsuits as a result of *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny.

[6] Kaelin v. Globe Communications Corp., No. CV-96-02935-DT, slip. op. (C.D. Calif., 1996).

[7] Kaelin v. Globe, 162 F.3d at 1039. The Ninth Circuit noted that "Kaelin complains about the first sentence of the article," which read, "Kato Kaelin is still a suspect in the murder of Nicole Brown Simpson and Ron Goldman, his friends fear." (*Id.* at 1045.) The court asserted, however, "[W]e assume for the purposes of this appeal that the text of the story is not defamatory. This case is about the headlines, especially the one appearing on the cover."

[8] *Id.* One of those editors, *National Examiner* news editor John Garton, said of the main headline in a deposition, "Journalistically I didn't think it was the best headline in the world."

[9] Richard M. Knoth, *Startling 9th Circuit Decision Says Headlines Alone Can Be Libelous*, Legal Times, Feb. 15, 1999, at S28.

[10] *'Kato' Kaelin Settles Libel Suit with Tabloid*, L.A. Times, Oct. 9, 1999, at B4.

In addition, how courts look at headlines in print libel cases may have important implications for libel cases involving Internet sites, where a few headline-like words frequently are used to summarize a longer text that can be reached only by following a hyperlink.[14] The results also could have implications for editing instruction and the continuing education of copy editors. Newspapers staff members and educators consider headline writing one of the most important copy-editing skills.[15] They may not, however, have considered how often headlines land publications in legal trouble. An analysis of opinions issued over 35 years will provide perspective.

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[11] Bruce W. Sanford, Libel and Privacy: The Prevention and Defense of Litigation 46-47 (1985).

[12] Brian C. Murchison, John Soloski, Randall P. Bezanson, Gilbert Cranberg & Roselle L. Wissler, *Sullivan's Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. Rev. 112 (1994).

[13] Deckle McLean, *Libel Consequences of Headlines*, 66 Journalism Q. 924 (1989).

[14] Knoth, *Startling 9th Circuit Decision*, *supra* note 9, at S28.

[15] Ann Auman & Betsy B. Alderman, *How Editors and Educators See Skills Needed for Editing*, Newspaper Res. J., Winter/Spring 1996, at 2. The study found that both top newspaper editors and journalism school editing instructors ranked headline- and cutline-writing among the four most important of eight skills taught in editing classes. *See also* Jerry Hilliard & Randall W. Hines, *Opinions of Journalists on Headline Traditions*, Newspaper Res. J., Fall 1994, at 2.

## Literature review

Headlines have a variety of functions. In a recent study, Edward J. Smith[16] found that they communicate meaning by summarizing story content,[17] conveying story tone, indicating by their size the relative importance of stories, and telling the reader something about the image of the newspaper.[18] Headlines serve graphic design functions by separating stories on a page, which helps readers navigate visually, and by introducing white space,[19] which makes the page more attractive.

Headlines also "sell" stories by attracting attention, conveying a sense of immediacy, encouraging reading, creating a vivid impression, luring readers into the full story, and indicating a reward for reading.[20] These are important functions because, as Earl English reported in 1944, readers are often "shoppers" who glance at a headline for as little as a fraction of a second before determining whether to keep reading.[21] In that sense, Bob Staake could not have been more correct when he referred in 1986 to the *New York Post*'s Vincent Musetto — who wrote the headline "Headless Body in Topless Bar" — as "in essence, the top salesperson at the *Post*."[22]

There are some readers, however, who rarely, if ever, can be lured beyond the big type. For them, headlines do not summarize the news. They *are* the news. Elmer Emig reported in 1928 that

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[16] Edward J. Smith, *Leadlines May be Better than Traditional Headlines*, NEWSPAPER RES. J., Winter 1999, at 55.

[17] Headlines are so often assumed to accurately summarize stories that they are sometimes used by researchers as a method of measuring news content. *See* Deborah J. Blood and Peter C.B. Phillips, *Recession Headline News, Consumer Sentiment, the State of the Economy and Presidential Popularity: A Time Series Analysis 1989-1993*, 7 INT'L J. of OPINION RES. 2 (1995).

[18] Smith, at 56.

[19] *Id.*

[20] *Id.*

[21] Earl English, *A Study of the Readability of Four Newspaper Headline Types*, 21 JOURNALISM Q. 217 (1944).

[22] Bob Staake, *The Man Who Writes Those Headlines*, EDITOR & PUBLISHER, May 24, 1986, at 14.

192 of 375 respondents to a survey said they "based their opinions concerning the day's news on reading or skimming the headlines."[23] In 1980, Keith R. Stamm and M.-Daniel Jacoubovitch found that 110 participants in a study of newspaper readership read twice as many headlines as stories.[24] A year later, Judee K. Burgoon and Michael Burgoon reported that getting the day's headlines was the second most popular function of newspaper reading reported by readers of five mid-sized dailies.[25]

This reliance on headlines may be misplaced, however, in light of research published in 1980 by Edward J. Smith and Gilbert L. Fowler Jr. They designed a telephone-interview study of 237 people who were read 10 newspaper headlines and asked to say, in as much detail as possible, what they thought the accompanying story had been about.[26] The responses were compared with the stories and scored on a three-point scale, with 3 indicating total accuracy. No headline received a mean score above 2.24, and the mean score for all the headlines was only 12.64 out of 30.[27]

Other research indicates that even when readers see the entire story, inaccurate headlines may lead them to form wrong impressions of the story's content. Although Gloria Leventhal and Susan J. Gray did not find this effect in an experiment in which 148 college students read simulated news stories topped by headlines containing various innuendoes,[28] it has been noted in at least three studies. In 1953, Percy H. Tannenbaum reported that students who read about a fictional murder defendant were significantly more likely to believe he was guilty if the story carried the headline "Admits Ownership of Frat Murder Weapon" than if the story was headlined "Many Had Access to Frat Murder Weapon" or "Approach Final Stage in Frat Murder Trial."[29] Steve Pasternack reported a similar effect in 1987 after conducting an experiment in which groups of undergraduates read various versions of a story and headline about a theft arrest.[30] Those who received a headline defaming the subject of the article atop a non-defamatory story rated the likelihood of the subject being a thief almost as high as those who received both a defamatory article and headline.[31] Similarly, John G. Geer and Kim Fridkin Kahn reported in 1993 that 112 students' perceptions of the main points in a fictional story about the platform of a real Arizona gubernatorial candidate were influenced by the accompanying headlines in two-thirds of the cases.[32] The researchers also found that a negative headline about the candidate was far more easily recalled than a positive headline.[33]

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[23] Elmer Emig, *The Connotation of Newspaper Headlines*, 4 Journalism Q. 53 (1928).

[24] Keith R. Stamm & M.-Daniel Jacoubovitch, *How Much Do They Read in the Daily Newspaper: A Measurement Study*, 57 Journalism Q. 238 (1980).

[25] The markets were Salinas and Stockton, Calif.; Binghampton and Niagara Falls, N.Y.; and Rockford, Ill. Judee K. Burgoon & Michael Burgoon, *The Functions of the Daily Newspaper*, 2 Newspaper Res. J., July 1981, at 29.

[26] Edward J. Smith & Gilbert L. Fowler Jr., *How Comprehensible Are Newspaper Headlines?* 59 Journalism Q. 305 (1982).

[27] *Id.* at 306. Being read a headline over the phone obviously is not the same experience as reading a headline to oneself. Smith and Fowler note, however, that subjects were read the headlines "slowly and clearly."

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[28] Gloria Leventhal & Susan J. Gray, *Can Innuendos in Headlines Affect Perceptions?* 69 PSYCHOL. REP. 801 (1991). Sixty-seven male and 81 female undergraduate students were given three simulated news stories, each concerning a different crime. Each student received a headline for each story that was designed to be favorable to the aggressor, unfavorable or neutral. No correlation was found between subjects' opinions of the parties involved and which headline they received.

[29] Percy H. Tannenbaum, *The Effect of Headlines on the Interpretation of News Stories*, 30 JOURNALISM Q. 189 (1953). Tannenbaum found a less significant effect when students read stories about an education council's consideration of revisions to university academic calendars. This should not surprising to present-day readers of the academic calendar story Tannenbaum used. It addresses a complex issue — whether a trimester, quarter, or semester calendar is best — in only seven paragraphs, and at least one of the quotes supplied in support of a position is vague.

[30] Steve Pasternack, *Headlines and Libel: Is the 'Unit' Approach the Most Effective?* NEWSPAPER RES. J., Winter 1987, at 33. Ten of the students received a defamatory article topped by a defamatory headline; 10 received a defamatory story topped by a non-defamatory headline; 10 received a non-defamatory article with a defamatory headline; and 10 received a non-defamatory article and headline.

[31] *Id.* Students were asked to rate the likelihood that the protagonist was a thief on a scale of 1 to 10, with 10 being very likely. Students who received a defamatory headline atop an accurate story had a mean score of 6.4. Those who received a defamatory headline atop a defamatory story had a mean score of 7.1

The key idea in these studies — that headlines make a larger and more lasting impression on readers than stories — is echoed when courts rule, as the U.S. Ninth Circuit did in *Kaelin v. Globe Communications*, that allegedly libelous headlines can be actionable even if the accompanying story is accurate. The idea is not a new one; a Tennessee court stated it in 1939 in *Black v. Nashville Banner Publishing Co.*:

> The headline of an article or paragraph, being so conspicuous as to attract the attention of persons who look casually over a paper without carefully reading all its contents, may in itself inflict very serious injury upon a person, both because it may be the only part of the article which is read, and because it may cast a graver imputation than all the other words following it. ... [I]n publications . . . claimed to be libelous, the headlines directing attention to the publication may be considered as a part of it, and may even justify a court or jury in regarding the publication as libelous when the body of the article is not necessarily so.[34]

That, however, is just one of the approaches courts can take to false and defamatory headlines atop accurate stories. Many courts consider headlines and accompanying stories together, following the "unit approach"[35] (known informally, as "reading headlines as parts of wholes,")[36] which can lead to the determination that the harmful effect of a false and defamatory headline is canceled out by an accurate story. Other courts use a variation on the unit approach called the "fair index" rule, stated more than 100 years ago in *Lawyers' Co-op. Publishing Co. v.*

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[32] John G. Geer & Kim Fridkin Kahn, *Grabbing Attention: An Experimental Investigation of Headlines During Campaigns*, 10 POL. COMM. 184 (1993). Students who read a headline about the candidate's anti-drug stand were more likely to say that was the main point of the story than were students who read headlines about his experience or his reduced lead in the polls. There was a similar correlation between the poll headline and students' perceptions that the main point of the story was the horse race, though no such correlation was found for the headline focusing on the candidate's experience.

[33] *Id.* at 185.

[34] 141 S.W.2d 908, 912 (Tenn. App. Ct. 1939).

[35] Pasternack, *supra* note 30, at 33.

[36] McLean, *supra* note 13, at 927.

*West Publishing Co.* (1898).[37] This common law rule holds that if an allegedly defamatory headline is generally supported by that story, it is considered a "fair index" of the story and is not actionable.[38]

The two mass communication studies that investigated headline libel concentrated, as this paper does, on exploring how courts have evaluated allegedly libelous headlines. Both considered together two kinds of cases: those in which the plaintiff objected to the headline *and* to some aspect of the story and those in which an allegedly libelous headline was accompanied by an accurate story. In a 1989 *Journalism Quarterly* article, Deckle McLean considered 18 cases decided between 1971 and 1986 and noted that although most of the courts used the unit approach, some evaluated headlines independently of stories.[39] In an unpublished 1996 study, Frank Fee examined 36 libel cases decided between 1983 and 1994 and found that 28 courts followed the unit approach.[40]

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[37] 32 N.Y. App. Div. at 590. "Defamatory head lines [sic] are actionable though the matter following is not, unless they fairly indicate the substance of the matter to which they refer . . . unless they are a fair index of the matter contained in a truthful report." The rule was restated in clearer language in Schermerhorn v. Rosenberg, 73 A.D.2d 276, 287 (N.Y. Sup. Ct., App. Div. 1980): "To determine whether the headline is a fair index of the article with which it appears, both must be considered together. . . . If the headline is a fair index of an accurate article, it is not actionable. If it is not a fair index, then the headline must be examined independently to determine whether it is actionable under general principles of libel." The New York Supreme Court Appellate Division then offered this rationale: "That the defamatory meaning of the headline may be dispelled by a reading of the entire article is of no avail to the publisher. A headline is often all that is read by the casual reader and therefore separately carries a potential for injury as great as any other false publication."

[38] Although the unit rule and the fair index rule both call for the headline and story to initially be read together, each rule does something different with that reading. The unit approach generally allows the large plus of an accurate story to offset the smaller minus of an errant headline. The more conservative fair index rule uses a more subtle comparison. It allows for some differences in interpretation between story and headline but stresses the need to find common ground to avoid liability.

[39] McLean, *supra* note 13, at 924-925.

[40] Frank Fee, *Getting the Big Type Right: How Libel Courts Read the Power of Headlines*, unpublished paper presented at the Association for Education in Journalism and Mass Communications Southeast Regional Colloquium, Roanoke, Va., March 14-16, 1996.

Discussion of defamatory headlines also has been limited in the legal literature. In 1988, Alan J. Hartnick described how courts had used the unit approach and fair index rule in a handful of New York cases,[41] and in 1997, Barry B. Langberg and Beth Dumas examined headline libel cases involving tabloid newspapers.[42] Other discussions of headline libel have focused on specific cases,[43] including *Kaelin*.[44]

In summary, research has shown that headlines are important devices for readers. For some, they *are* the news. For others, they help shape perceptions of the news. Courts, however, take varying approaches to allegedly libelous headlines atop accurate stories. Research has attempted to determine which approach is prevalent, but neither mass communication studies nor the legal literature has produced a comprehensive study of court approaches to allegedly libelous headlines atop accurate stories.

### Research questions

No research has attempted to exam all the state and federal opinions on headline libel reported since *New York Times v. Sullivan* constitutionalized libel law in 1964. Just as important, no study has isolated cases involving allegedly false and defamatory headlines atop accurate stories from cases in which the plaintiff complained that he or she was libeled by *both* the headline and the story.[45] This study, then, addresses three related questions:

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[41] Alan J. Hartnick, *Dealing With Libelous Headlines*, N.Y.L.J., April 15, 1988, at 5.

[42] Barry B. Langberg and Beth Dumas, *False Implications: Defamation Claims Over Tabloid Headlines*, ENT. L. & FIN., January 1997, at 1.

[43] *E.g.*, *Lets Libel Judgment Stand for Misleading Head on True Story*, NEWS MED. & THE LAW, January 1979, at 12-13; *'Mobster' Headline is Not Libelous, Appeals Court Rules for Sun-Times*, NEWS MED. & THE LAW, January-February 1984, at 38; Daniel Wise, *Libel Trial Ordered Over Article on Painting*, N.Y. LAW J., December 3, 1993, at 1; Daniel Wise, *Court Dismisses Libel Suit by Judge Against 'Voice'; Santaella Rebuffed in Claim Over 'Worst Judges' Article*, N.Y. LAW J., June 7, 1994, at 1; *Cuban Exile Settles 'Mobster' Libel Lawsuit*, THE DAILY REC., September 18, 1996, at 9; Emily Swiatek, *Million-dollar Libel Case Challenges Actual-Malice Standard*, THE IND. LAWYER, October 1, 1997; E.E. Mazier, *Allegedly Defamatory Headline Must Be Read with its Article*, N.J. LAWYER, February 10, 1997, at 22.

[44] Knoth, *Startling 9th Circuit Decision*, *supra* note 9; Stephanie Levy, *Headlines Alone May Constitute Libel, Ninth Circuit Says*, TRIAL, May 1999 at 102; and Pamela A. MacLean, *Headlines Can Be Defamatory, 9th Circuit Rules; Tabloid Said 'Cops Think Kato Did It' — But 'It' Meant Perjury; Not Liability-free Zones*, L.A. DAILY J., Dec. 31, 1998, at 1.

1. What approaches have courts taken to allegedly false and defamatory headlines accompanying accurate articles since the U.S. Supreme Court decided *New York Times v. Sullivan*?

2. Was the Ninth Circuit's ruling in *Kaelin* that a false and defamatory headline can be actionable even if it is accompanied by an accurate story an anomaly or part of a trend?

3. What was the rationale behind the *Kaelin* opinion, and what are its implications?

## Methodology

This paper used traditional legal research methods to examine libel cases decided from 1964 through 1999 in which the only allegedly defamatory material was a headline. The research attempted to locate all relevant reported federal and state cases since *New York Times v. Sullivan*. Cases were located in these sources: *Media Law Reporter*,[46] *West Decennial Digests*,[47] the Lexis electronic database, and the literature reviewed.[48]

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[45] The distinction is an important one. Courts considering an allegedly libelous headline atop a story that all parties agree is accurate face a greater conundrum than courts evaluating an allegedly libelous headline atop a story that the plaintiff also charges is libelous. In the former case, courts must balance the weight of allegedly false and defamatory display type against the truthful impression conveyed by text. In the latter case, if the court finds both the headline and story to be false and defamatory, no balancing act is needed.

[46] All cases discussed under Libel and Slander subsection 11.0507 "Defamation — Defamatory content — Headlines" were examined.

[47] The Libel and Slander subsection 19, "Construction of Language Used," in the Seventh (1956-1966), Eighth (1966-1976), Ninth Part I (1976-1981), Ninth Part II (1981-1986), Tenth Part I (1986-1991), and Tenth Part II (1991-1996) digests was examined to locate libel cases that mentioned a headline. Cases from the Seventh Decennial Digest that were decided before 1964 were eliminated.

[48] Although an effort was made to locate all cases decided since 1964 in which a headline was the only allegedly defamatory material, inconsistent reporting methods make it almost impossible to say that all cases of any type have been considered in any study.

## Findings

Examination of more than 100 cases involving claims of headline libel revealed that most involved assertions by the plaintiff that both the headline *and* some aspect of the story were false and defamatory.[49] However, twenty-three cases were located in which an allegedly libelous headline accompanied a story that was completely accurate, substantially accurate, considered by the court to be accurate, or not cited by the plaintiff as a cause for complaint. It is those 23 cases with which this paper is concerned.[50]

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[49] These cases included but were not limited to Perugini v. Journal Publishing Co., Inc., 1999 Conn. Super. LEXIS 419 (Conn. Super. Ct. 1999); Medure and Medure v. New York Times Company, 60 F. Supp. 2d 477; Daniel Goldreyer Ltd. v. Dow Jones & Company, 259 A.D.2d 353 (N.Y. Sup. Ct. App. Div. 1999); Elder v. Gaffney Ledger S.E.2d 383 (S.C. Ct. App. 1999); Weinstein v. Friedman, 24 Media L. Rep. (BNA) 1769 (S.D.N.Y. Sup. Ct. 1996); Sissler v. Gannett Co., Inc., 516 A.2d 1083 (N.J., 1986); Ganett Suburban Newspapers, 25 Media L. Rep. (BNA) 2174 (N.Y. Sup. Ct. App. Div. 1996); Pope v. Chronicle Publishing Co., 95 F.3d 607 (7th Cir. 1996); Knaeble v. Cowles Media Co., 25 Media L. Rep. (BNA) 1860 (Minn. Ct. App. 1997); Gamler v. Akron Beacon Journal, 23 Media L. Rep. (BNA) 1845 (N.D. Ohio 1995); Morningstar Inc. v. Los Angeles Superior Court, 23 Cal. App. 4th 676 (Cal. Ct. App. 1994); Patten v. Minneapolis Star Tribune, 21 Media L. Rep. (BNA) 1385 (Minn. D.Ct. 1992); John v. Journal Communications, Inc., 801 F. Supp. 199 (E.D.Wis. 1992); Becher v. Troy Publishing Co. Inc., 183 A.D.2d 230 (N.Y. Sup. Ct. App. Div. 1992); Crall v. Gannett, 20 Media L. Rep. (BNA) 1987 (S.D.O. 1992); Locricchio v. Evening News Association, 476 N.W.2d 112 (Mich. 1991); Moyer v. Amador Valley Joint Union High School District, 225 Cal. App. 3d 720 (Cal. Ct. App. 1990); Lee v. The Columbian, 826 P.2d 217 (Wash. Super. Ct.); Straitwell v. National Steel Corp., 16 Media L. Rep. (BNA) 1329 (4th Cir. 1989); Haberstroh v. Crain Publications, 545 N.E.2d 295 (Ill. Ct. App. 1989); Stone v. Banner Publishing Corp., 677 F. Supp. 242 (D.Vt. 1988); Stevens v. Independent Newspapers Inc., 15 Media L. Rep. (BNA) 1097 (Del. Super. Ct. 1988); Prescott v. Newsday Inc., 150 A.D.2d 541 (N.Y. Sup. Ct. 1988); Blake v. Gannett Co. 529 So. 2d 59 (Miss. 1988); Contemporary Mission v. New York Times, 842 F.2d 612 (2nd Cir 1988); Salerno v. Philadelphia Newspapers Inc., 546 A.2d 1168 (Pa. Super. Ct. 1988); Herron v. Tribune Publishing Co., 736 P.2d 249 (Wash. 1987); Roux v. Thoroughbred Owners and Breeders Association, 13 Media L. Rep. (BNA) 1943 (N.Y. Sup. Ct. 1987); Dunn v. Gannett New York, 833 F.2d 446 (3rd Cir. 1987); Wecht v. PG Publishing Company, 725 A.2d 7880 (Pa. Super. Ct. 1986); Langston v. Eagle Publishing Company, 719 S.W.2d 612 (Tex. Ct. App. 1986); Jadwin v. Minneapolis Star, 390 N.W.2d 437 (Minn. Ct. App. 1986); Owen v. Carr, 478 N.E.2d 658 (Ill. Ct. App. 1985), *aff'd*, 497 N.E.2d 1145 (Ill. 1986); Lavin v. New York News, 757 F.2d 1416 1985 (3rd Cir. 1985); Shipley v. Knoxville Journal, 670 S.W.2d 222 (Tenn. Ct. App. 1984); Bryant v. Associated Press, 595 F. Supp. 814 (D.V.I. 1984); Antonelli v. Field Enterprises, 450 N.E.2d 876 (Ill. Ct. App. 1983); Hunt v. Liberty Lobby, 720 F.2d 631 (11th Cir. 1983); Gurda v. Orange County Publications Division of Ottaway Newspapers, Inc., N.Y.S.2d 417 (N.Y. Sup. Ct. App. Div. 1982); Dostert v. Washington Post, 531 F. Supp. 165 (N.D.W.Va. 1982); Bellamy v. Arno Press, 8 Media L. Rep. (BNA) 1420 (E.D.N.C., 1982); Fredericksen v. New York Post, 8 Media L. Rep. (BNA) 1799 (N.Y. Sup. Ct. 1982); Shutt v. Harte-Hanks, 7 Media L. Rep. (BNA) 2559 (E.D. Mich. 1981); Adreani v. Hansen, 400 N.E.2d 679 (Ill. Ct. App. 1980); Brophy v. Philadelphia Newspapers, 422 A.2d 625 (Pa. Super. Ct. 1980); Hein v. Lacy, 616 P.2d 277 (Kan. 1980); Naked City, Inc., v. Chicago Sun Times, 395 N.E.2d 1042 (Ill. Ct. App. 1979); Dauw v. Field Enterprises, 397 N.E.2d 41 (Ill App. 1st Dist. 1979); DeLuca v. New York News, 4 Media L. Rep. (BNA) 2312 (N.Y. Sup. Ct. 1978); Cochran v. Indianapolis Newspapers, Inc. 372 N.E.2d 1211 (Ind. Ct. App. 1978); Sprouse v. Clay Communication, 211 S.E.2d 674 (WVa. Ct. App. 1975); McNair v. The Hearst Corporation, 494 F.2d 1309 (9th Cir. 1974); and Jones v. Sun-News, 158 S.E.2d 909 (S.C. 1968).

[50] Bandido's Inc. v. Journal Gazette Co., 712 N.E.2d 446 (Ind. 1999); Kaelin v. Globe Communications Corp., 162 F.3d 1036 (9th Cir. 1998); Molin v. Trentonian, 687 A.2d 1022 (N.J. Super. Ct. App. Div. 1997); Jefferson v.

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### *Prevalent approach: Considering headlines as parts of a whole*

Although the Ninth Circuit ruling in *Kaelin v. Globe Communications* was not without precedent, it marked a sharp departure from prevalent practice. In 20 of the 23 cases analyzed (87 percent), courts considered allegedly libelous headlines in context of the accurate stories that accompanied them and usually found that the accurate story dispelled the effect of the headline.[51] However, the exact way in which the courts read headlines and stories together varied as courts modified their analyses to fit the facts of the cases. The approaches are outlined below.

#### *Using the unit approach*

In 14 of the 20 cases in which allegedly libelous headlines and accurate stories were considered together, courts took a unit approach, viewing the headline as just one part of a package that also included all the words in the story. These 14 cases, all of which produced a ruling in favor of the media defendant, can be divided into four groups:

— In one case, a court determined that a substantially accurate story overcame the effect of a headline that portrayed as guilty a plaintiff who was only charged with a crime.

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Winnebago County, Illinois, 23 Media L. Rep. (BNA) 1641 (N.D. Ill. 1995); 647 A.2d 562 (Pa. Super. Ct. 1994); Swanton v. Ute City Tea Party Ltd., 22 Media L. Rep. (BNA) 2560 (Colo. Dist. Ct. 1994); Von Gerichten v. Long Island Advance, 609 N.Y.S. 246 (N.Y. Sup. Ct. App. Div. 1994); Gunduz v. The New York Post Co. Inc., 188 A.D.2d 294 (N.Y. Sup. Ct. App. Div. 1992); Grimsley v. Guccione, 703 F. Supp. 903 (M.D. Ala.); Seldon v. Shanken, 143 A.D.2d 3 (N.Y. Sup. Ct. App. Div. 1988); McCabe v. Rattiner, 814 F.2d 839 (1st Cir. 1987); Fudge v. Penthouse International, 14 Media L. Rep. (BNA) 1238 (D. R.I., 1987), 14 Media L. Rep. (BNA) 2353 (1st Cir. 1988); Burgess v. Reformer Publishing, 508 A.2d 1359 (Vt. 1986); Whitten v. Commercial Dispatch, 487 So.2d 843 (Miss. 1986); Seymour v. A.S. Abell Company, 557 F. Supp. 951 (D. Md. 1983); Fernandes v. Tenbruggencate, 649 P.2d 1144 (Haw. 1982); Shapiro v. Newsday, 5 Media L. Rep. (BNA) 2607 (N.Y. Sup. Ct. 1980); Schermerhorn v. Rosenberg, 73 A.D.2d 276 (N.Y. Sup. Ct. App. Div. 1980); Graham v. New York News, 2 Media L. Rep. (BNA) 2356 (N.Y. Sup. Ct. 1977); Forrest v. Lynch, 347 So.2d 1255 (La. Ct. App. 1977); Ross v. Columbia Newspapers, 221 S.E.2d 770 (S.C. 1976); Bray v. Providence Journal Co., 220 A.2d 531 (R.I. 1966); and Reed v. Albanese, 223 N.E.2d 419 (Ill. Ct. App. 1966).

[51] Media defendants won 18 of the 20 cases (90 percent) in which courts read headlines in light of the stories they accompanied. (This category includes cases in which courts used the unit approach and fair index rule.)

— In six cases, courts ruled that accurate stories overcame the effects of headlines that portrayed plaintiffs who were facing some difficulty as being in worse trouble than they really were.

— In four cases, courts read the headlines in context of the accompanying stories and found the headlines to be innocent constructions incapable of defamation.

— In three cases, courts read the headlines in context of the accompanying stories and ruled that the headlines were protected opinion.

*Molin v. Trentonian* (1997)[52] was the only case examined in which a court found that an accurate story overcame the effect of a headline that falsely portrayed the plaintiff as a convicted criminal. Steven F. Molin filed that lawsuit after the daily newspaper in New Jersey's capital city printed a story about his 1993 arrest on a stalking charge. The article, which was based on facts obtained from a police report, accurately related that Molin had merely been charged with, not convicted of, stalking.[53] However, the accompanying headline, "Stalker's Arrest Ends Year of Terror," labeled Molin a stalker. After the stalking charge was reduced to harassment and that charge was dismissed, Molin sued the newspaper, two writers, and an assistant editor. Although Molin correctly noted that he had "never, at any time, been found guilty of the crime of stalking,"[54] the trial court issued a summary judgment for the defendants.

When Molin appealed, the New Jersey Appellate Division upheld the summary judgment, saying the article's identification of Molin as "the alleged stalker" and the use of the word "charged" in the caption to an accompanying photo of Molin created an overall truthful impression.[55] The court noted that New Jersey courts generally "view alleged defamatory language in the context of the entire publication in which it appears," and wrote, "We see no reason to abandon this principle when considering language which appears in an article's headline."[56] The appellate court also made an assertion that flies in the face of some of the previously cited mass communication research demonstrating the psychological impact of headlines: "Were we to create a different standard applying only to headlines, we would be accepting that headlines wield more influence than the more substantive body of the article. Evidence of that has not been placed before us."[57]

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[52] Molin v. Trentonian, 687 A.2d 1022 (N.J. Super. Ct. App. Div. 1997).

[53] E.E. Mazier, *Allegedly Defamatory Headline Must Be Read with its Article*, N.J. LAWYER, Feb. 10, 1997, at 22.

[54] Molin v. Trentonian, 687 A.2d at 1023.

In six cases, courts using the unit approach found that accurate, non-defamatory articles about plaintiffs who faced some trouble mitigated the effect of headlines that suggested they were in serious, usual legal, difficulty. The earliest case, *Reed v. Albanese* (1966),[58] resulted from publication in Chicago's *North Loop News* of a headline that said Nathaniel J. Reed Jr., the registered agent of a building corporation, had been jailed for building code violations when, though convicted of the violations, he was never behind bars. Reed, an attorney, sued over the headline, "Reed Jailed for Housing Violations." However, the Appellate Court of Illinois found that because the accompanying story accurately reported that a municipal judge had merely issued a warrant for Reed's incarceration, the headline was not actionable.[59]

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[55] *Id.* at 1024.

[56] *Id.*

[57] *Id.*

[58] 223 N.E.2d 419 (Ill. App. Ct. 1966).

[59] Id. at 423. "[W]hen the headline is read together with the body of the article . . . the article as a whole does not impute that the plaintiff was placed in jail. The relevant text of the article states that a Municipal Court judge '. . . last Friday [a week before the publication of the article] issued a warrant of commitment to the House of Correction for Nathaniel J. Reed, Jr., in lieu of $ 2400.00 in fines for housing violations' . . . and the reader of common and reasonable understanding would be presumed to understand that the quoted statement meant that the Municipal Court ordered Reed committed unless he paid a $2,400 fine."

The South Carolina Supreme Court drew a similar conclusion in *Ross v. Columbia Newspapers* (1976).[60] It found that the headline "Man Questioned in Wife's Death Released From Jail" was not actionable even though the woman in question, the victim of a shooting, did not die. A headline and article must be considered "as one document" in determining defamation, the court wrote, and the "Death" headline was "rendered innocuous" by the last sentence of the article, which explained that the woman was in serious condition in intensive care.[61]

In *Graham v. New York News* (1977),[62] The New York Supreme Court for New York County ruled that although the headlines "Cops Goof, Free Slay Suspect" and "Cops Grab and Lose Figure in 2 Rubouts" might "imply that plaintiff knowingly caused the release of a murder suspect, such meaning cannot be gleaned from the article as a whole."[63] The court dismissed the case. In *Swanton v. Ute City Tea Party Ltd.* (1994),[64] the Colorado District Court of Pitkin County conceded that the *Aspen Daily News* headline "Bar Closes for 30 Days, Owners Admit Drug Sales" could, if read alone, suggest that the owners of an Aspen bar sold illegal drugs or knew of past illegal drug sales as they were taking place. However, taking the headline in the context of the story, the court said, "there is no room to conclude that the gist of the article is that the owners were admitting they knew the sales were taking place. The most consistent conclusion is that they admitted the sales occurred, but denied knowledge of them."[65]

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[60] 221 S.E.2d 770 (S.C. 1976).

[61] *Id.* at 773. Plaintiff Larry M. Ross also charged in his lawsuit that he was libeled by two stories, including the article that appeared under the headline cited above. The South Carolina Supreme Court found, however, that "the articles were clearly not false or defamatory." (*Id.* at 772).

[62] 2 Media L. Rep. (BNA) 2356 (N.Y. Sup. Ct. 1977).

[63] *Id.* at 2358.

[64] 22 Media L. Rep. (BNA) 2561 (Colo. Dist. Ct. 1994).

[65] *Id.* at 2563. After the Aspen Police Department filed a complaint alleging that the bar "had a reputation for being a place where cocaine and other illegal drugs could be obtained" (at 2561), the city council, acting as the Aspen Liquor Licensing Authority, negotiated a settlement in which the bar's liquor license was suspended.

In two cases involving plaintiffs portrayed as being in worse legal trouble than they were, courts determined that accurate stories took the sting out of headlines that used the word "theft" to describe actions that were not, strictly speaking, thefts. Maryland State Police Officer Dennis Seymour sued several news organizations[66] that he maintained falsely accused him in headlines of theft, a criminal charge, when he faced only administrative charges of conversion and misappropriation of state property, use of official position for financial gain, and securing secondary employment without approval. In *Seymour v. A.S. Abell Company* (1983),[67] the U.S. District Court for Maryland pointed out that because all the articles said the investigation was an internal police probe, not a criminal investigation, and noted that the charges were administrative, not criminal, the stories were "substantially accurate," and no jury issue was present.[68] It granted summary judgment for the media defendants.

Similarly, in *Reiter v. Manna* (1994),[69] the Pennsylvania Superior Court found that the erroneous use of "theft" in a headline about the unauthorized moving of campaign signs did not constitute, in light of the accuracy of the accompanying article, evidence of actual malice on the part of the *New Castle News*. That newspaper had published a headline that read "Judge: Sign Theft is a Civil Complaint" atop a story that accurately explained that no criminal charges had been filed.[70]

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[66] Defendants included A.S. Abell, owner of Baltimore's *Evening Sun*; United Press International; and Capital Gazette Newspapers, publisher of the *Evening Capital*.

[67] 557 F. Supp. 951 (D. Md. 1983).

[68] *Id.* at 956.

[69] 647 A.2d 562 (Pa. Super. Ct. 1994). The case was consolidated with an appeal from Papa v. Manna, 22 Media L. Rep. (BNA) 1144 (Pa. Ct. Common Pleas, Lawrence Co., 1993).

[70] Patricia Allen, a candidate for district justice, accused Alfred Papa and Robert Reiter — the husband of one of her opponents in the race, Mary Ann Reiter — of taking Allen's campaign signs from a Shenango Township, Pa., property and placing them on property owned by Papa. Allen attempted to file a criminal complaint about the matter.

In four cases, *Bray v. Providence Journal Company* (1966),[71] *Shapiro v. Newsday* (1980),[72] *Fernandes v. Tenbruggencate* (1982),[73] and *Jefferson v. Winnebago County, Illinois* (1995),[74] courts found that allegedly libelous headlines were, when viewed in the context of the story, incapable of imputing wrongdoing to the plaintiff and thus not actionable.

In *Bray*, a teacher who was also a teacher's alliance representative charged that he was falsely portrayed as guilty of perjury by the *Providence Journal* headline "Testimony Challenged, Alliance Head 'Lied,' Dr. Savoie Declares." The headline appeared above a story about a Pawtucket, R.I., school committee meeting at which the chairman, Dr. Savoie, discussed an earlier appearance by the plaintiff, William C. Bray, at a state school board hearing. According to the lawsuit, Savoie made "certain remarks questioning the veracity of the plaintiff and the accuracy of certain statements" Bray made at the hearing.[75] It is not clear whether those claims were repeated in the story.[76] It is clear, however, that Bray was chiefly concerned about the headline. He charged that its use of the word "testimony" to characterize remarks he made at the hearing left the false impression that the state school board hearing involved sworn testimony and, thus, that he had lied under oath, committing perjury. The Rhode Island Supreme Court, however, ruled that the article "when read in its entirety, is not reasonably capable of conveying to the ordinary mind the defamatory meaning alleged."

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but District Attorney William M. Panella disallowed the filing, saying the case belonged in civil court. The story in question centered on a judge's ruling that Panella had acted properly.

[71] 220 A.2d 531 (R.I. 1966).

[72] 5 Media L. Rep. (BNA) 2607 (N.Y. Sup. Ct. 1980).

[73] 649 P.2d 1144 (Haw. 1982).

[74] 23 Media L. Rep. (BNA) 1641 (N.D. Ill. 1995).

[75] Bray v. Providence Journal Company, 220 A.2d at 533.

[76] The *Providence Journal* story is not reproduced in the Rhode Island Supreme Court opinion.

In similar fashion, the Hawaii Supreme Court ruled in *Fernandes v. Tenbruggencate* that the headline "Brother Helps in Kauai Zoning Request" was not actionable. Although on its own the headline might have given the impression that the plaintiff city councilman used family influence improperly, the court said the story as a whole was incapable of supporting a defamatory inference.[77] In fact, the article revealed that the plaintiff had tried to *avoid* a conflict of interest by asking the county board of ethics beforehand whether it was proper for him to vote on his brother's rezoning request.

In *Jefferson v. Winnebago County, Illinois*, the plaintiff, probation officer Giles Jefferson, said he was defamed by publication of an article about his criticisms of law enforcement on a talk radio show under the label "crime." The U.S. District Court for the Northern District of Illinois applied the state's common law "innocent construction" rule[78] and found that the heading was not actionable. The court wrote, "While the report has a subheading 'CRIME,' nothing in the body of the article suggests that the plaintiff had engaged in criminal conduct." In *Shapiro*, the owner of a business in the Jackson Heights section of Queens charged that he was libeled when *Newsday* ran a photograph that included an image of his business' sign under the headline "Jackson Heights: Cocaine Capital." The New York Supreme Court for Queens County found that, in light of the story, there was no way the headline, which referred to the neighborhood, could be considered "of and concerning" the plaintiff or libelous in nature.

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[77] "Reading the headline and the body of the article as a whole, we believe that the publication is incapable of supporting the defamatory inference that appellant acted unethically," the court wrote. "While the headline may raise questions in the minds of its readers, the article specifically states, '[u]nder the County's ehtics [sic]regulations, a government official acting on something in which his brother has a financial interest is not considered in conflict.'" *Id.* at 1148.

[78] As stated in Chapski v. Copley Press, 442 N.E.2d 195 (Ill., 1982), that rule says that a statement "is to be considered in context with the words and the implications given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*."

In three cases, courts relying on the unit approach found that headlines were protected statements of opinion. The three rulings were made during a 13-month period in 1987 and 1988. Two originated in the same court, the U.S. District Court for Rhode Island, and two involved the "Hard Times" section of *Penthouse* magazine.

The first of these unusual rulings was made in *McCabe v. Rattiner* (1987).[79] Thomas McCabe, the owner of a time-share development, sued for libel after Daniel Rattiner published in Rhode Island's *Block Island Times* a story about his experiences listening to time-share pitches. It was not the article or the main headline, "Selling Timesharing on the Street," to which McCabe objected. Instead, he contended he had been libeled by the jump headline, the single word "Scam," which was placed atop the portion of the story continued on a later page. Rattiner testified that although the word was inserted by mistake by his assistant, it did, in fact, represent his opinion of the time-share enterprise. The U.S. District Court for Rhode Island ruled that the jump headline was protected opinion. When Rattiner appealed, the U.S. Court of Appeals for the First Circuit examined the jump headline "in the context of Rattiner's article,"[80] which, the court pointed out, was written "in first person narrative style [which] . . . puts the reader on notice that the author is giving his views."[81] The court agreed that the jump headline was opinion and found it not actionable.

*McCabe* was cited as precedent in two 1988 cases involving the "Hard Times" feature in *Penthouse* magazine. In the first, *Fudge v. Penthouse*,[82] the U.S. Court of Appeals for the First Circuit ruled that the headline "Little Amazons Attack Boys" did not defame the schoolgirls to which it referred, pupils at a Rhode Island school where fights between boys and girls had broken out during recess. The court considered the headline, which appeared above an accurate brief, to be opinion.

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[79] 814 F.2d 839 (1st Cir. 1987).

[80] *Id.* at 843.

[81] *Id.*

> We think that Penthouse's "Hard Times" column, in which the article about the girls appeared, is an example of a well-recognized genre: articles or fragments gleaned from the nation's press, appearing under satirical headlines penned by a magazine's editors and followed by the editor's wry comments. . . . This genre is by now common enough, across a broad spectrum of publications, that the average reader understands that the headline is the editors' ironic comment upon, rather than a literal representation of, what appears in the story reprinted from another source. Here, the editors' use of the genre, and their closing comment that "in the battle of the sexes, we'd certainly score this one for the girls," clearly signaled to the reader that the headline . . . was satirical opinion rather than fact.[83]

In *Grimsley v. Guccione*,[84] the U.S. District Court for the Middle District of Alabama cited *Fudge* and found the *Penthouse* headline "Birth of a Hemorrhoid" non-actionable. As in *Fudge*, the headline — about the birth of a son to a woman whose doctors told her she was suffering from hemorrhoids — appeared with wry commentary. "There is no question," the court wrote, "that the headline was merely an ironic comment upon that which appears in the text of the story."[85]

*A "fair index" of the story*

In six of the 20 cases in which headlines and stories were considered together, courts applied the "fair index" rule. The rule works like this: Courts look at the headline and the story. If the headline is considered to be a fair summary of the story, it is not actionable. If the headline is not a fair summary of the story, "then the headline must be examined independently to determine

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[82] Fudge v. Penthouse International, 14 Media L. Rep. (BNA) 1239, 14 Media L. Rep. (BNA) 2353 (1st Cir. 1988).

[83] *Id.* at 2356.

[84] 703 F. Supp. 903 (M.D. Ala.).

[85] Id. at 906.

whether it is actionable under general principles of libel."[86] This rule proved less favorable to media defendants than the unit approach. Courts using the rule decided two of the six cases in favor of the plaintiff. The media defendant in another case won only because the plaintiff was a limited-purpose public figure forced to prove actual malice.

How the fair index rule works is demonstrated by the three cases won by media defendants, all of which were heard in the New York Supreme Court Appellate Division. Applying the rule in *Gunduz v. The New York Post Inc.* (1992),[87] that court found that the headline "Public Enemy No. 1," which appeared with the subhead "City moves to yank license of Apple's 'worst taxi driver,'" was not actionable. Because the accompanying truthful story explained that the driver involved had received more summonses than any other in New York City, the headline was considered a fair index of the story. Similarly, in *Seldon v. Shanken* (1988),[88] a headline that appeared in one wine magazine over a story about the editorial practices of another was ruled not actionable. "Editorial Space for Sale in *Vintage*" was determined to be a fair index of a *Wine Spectator* article that reported its competitor's widely publicized plan to offer "in depth editorial coverage" to wineries that purchased advertising. The fair index rule was also cited by the court in *Von Gerichten v. Long Island Advance* (1994).[89] In that case, the court reversed a lower court's denial of summary judgment to a newspaper sued over a headline that accurately recounted an altercation between two motorists.[90]

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[86] Schermerhorn v. Rosenberg, 73 A.D.2d 276, 283 (N.Y. Sup. Ct. App. Div. 1980).

[87] 188 A.D.2d 294 (N.Y. Sup. Ct. App. Div. 1992).

[88] 143 A.D.2d 3 (N.Y. Sup. Ct. App. Div. 1988).

[89] 609 N.Y.S. 246 (N.Y. Sup. Ct. App. Div. 1994).

[90] *Id.* at 247. The headline in question is not reproduced in the court's opinion. Plaintiff George Von Gerichten, who was arrested after the altercation, found no fault with the story but charged the headline was a "maliciously based form of sensational journalism which pays no regard to the truth." *Id.* at 247.

Press defendants found the rule more problematic in *Burgess v. Reformer* (1986)[91] and *Schermerhorn v. Rosenberg* (1980).[92] In the former case, the Vermont Supreme Court reversed a trial court's grant of summary judgment for the *Brattleboro Reformer*, saying that the headline on a story about a college embezzlement investigation did not create the same impression as the accompanying article. "Grand Jury Probes Embezzlement — Burgess Denies Getting Funds" was "at the very least . . . ambiguous,"[93] the court wrote, and thus not a fair index of the accurate story it accompanied.[94] In the latter case, the New York Supreme Court Appellate Division affirmed that the headline "Schermerhorn says NDDC Can Do Without Blacks" was not a fair index of remarks by a New York state senator about the future composition of the Newburgh Development District Corporation. The court ruled that plaintiff Richard E. Schermerhorn, who said he had merely expressed his wish that the most qualified people available get seats on the NDDC, was libeled by the Middletown *Times Herald Record* and reporter Ron Rosenberg.

The fair index rule almost proved problematic for the Fort Wayne *Journal Gazette* in 1999 in *Bandido's v. Journal Gazette*.[95] That case had been filed more than 10 years earlier, after a copy editor working on a story about the forced closing of a restaurant wrote the subheadline "Investigators find rats, bugs at north-side eatery."[96] Although the accompanying article accurately reported that inspectors had not found rats, only "rodent droppings,"[97] Bandido's sued. A jury awarded the restaurant $985,000, but its verdict and award were overturned by the Indiana Court of Appeals,[98] and the restaurant owner appealed to the Indiana Supreme Court. In a lengthy opinion, a divided court announced it would adopt the fair index rule.

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[91] Burgess v. Reformer Publishing, 508 A.2d 1359 (Vt. 1986).

[92] 73 A.D.2d 276 (N.Y. Sup. Ct. App. Div. 1980).

[93] Burgess v. Reformer Publishing, 508 A.2d.at 1364.

[94] The headline was printed above a story about the investigation of alleged embezzlement by the former president of Mark Hopkins College. Burgess, the college's former treasurer and, at the time of the suit, the Brattleboro town agent, complained that the headline made it look as if his conduct was being investigated.

[95] 712 N.E.2d 446 (Ind. 1999).

[96] The subheadline, which appeared under the main headline "Health Board Shuts Doors of Bandido's," was eliminated from the newspaper's second edition, but returned, in a slightly revised form, for the newspaper's third edition. There, it read "Investigators find rats, bugs at north-side eatery." *Id.* at 449, note 2, and 468.

> We agree with the minority of jurisdictions that follow the "fair index" rule ... and adopt this approach when deciding whether a headline is defamatory. We believe this to be the best approach because in many respects, a defamatory headline may be much more injurious to a party than a defamatory article where the false statements may be buried in the story and go unnoticed by the average reader. This is especially true when an individual reads only the headline and not the story. In Indiana, a defamatory headline will be actionable even if the story following it is accurate, unless the headline is a fair index of the accurate article.[99]

Applying its new standard, the Indiana Supreme Court ruled that "rats" was not a fair index of "rodent droppings." It noted that although the article accurately described the reasons the restaurant was closed, the subheadline "clearly creates the impression that Bandido's was closed solely because of the discovery of rats and roaches (or bugs) and in addition, conjures up a depiction of the restaurant which is not entirely accurate. As such, we are hard pressed to conclude that the subheadline was a fair index of the story. Consequently, we examine the subheadline independently to determine whether the subheadline is defamatory and actionable under libel principles."[100] The court concluded 5-3 that although the newspaper perhaps behaved negligently at times connection with publication of the headline,[101] its actions did not rise to the level of actual malice.[102]

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[97] *Id.* at 449-450. The word "rats" never appeared in the article, which accurately reported that health inspectors noted "evidence of flies, roaches and rodents."

[98] Journal-Gazette Co. v. Bandido's Inc., 672 N.E.2d 969 (Ind. Ct. App. 1996).

[99] Bandido's v. Journal Gazette, 712 N.E.2d at 458.

[100] *Id.* at 458-459.

### *Headlines actionable despite accurate stories*

In three of the 23 cases studied, including *Kaelin v. Globe Communications Corp* ., courts considered headlines to be actionable despite the presence of accurate or substantially accurate stories. In each case, headlines implied that the libel plaintiffs had committed an act that was far worse than their actual behavior. In each case, the court ruling favored the plaintiff.

*Forrest v. Lynch* (1977)[103] was filed against the *New Orleans States-Item* by engineer Joel I. Forrest, who was hired by a New Orleans architectural firm to prepare design plans and specifications for the Louisiana State School of the Deaf in Baton Rouge. The newspaper accurately reported in a 1973 article that state officials liked his plans but said they were concerned that they were "somewhat proprietary to certain manufacturers."[104] The headline, however, made Forrest's behavior appear much worse. It read: "Bid Specs Reported 'Rigged.'"[105] After a non-jury trial in 1976, a state district court judge found the headline false and defamatory and ordered the newspaper to pay Forrest $10,000 in damages.[106]

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[101] The plaintiff and court pointed to problems with the copy editor's long-term work performance, the newspaper's supervision of her work, and the publication of a correction that did not meet the standards of the Indiana retraction statute. *Id.* at 466.

[102] The standard of fault Bandido's was forced to prove as a limited-purpose public figure. *Id.* at 453. Bandido's attempted to take the lawsuit to the U.S. Supreme Court, but certiorari was denied November 15, 1999, Bandido's v. Journal-Gazette, 120 S. Ct. 499 (1999).

[103] 347 So.2d 1255 (La. Ct. App. 1977). *See also Lets Libel Judgment Stand for Misleading Head on True Story*, NEWS MED & THE LAW, January 1979 at 12.

[104] *Cited in* 347 So.2d at 1257.

[105] "Lets Libel Judgment Stand" at 14.

[106] The *States-Item* appealed to the Louisiana Court of Appeals, which affirmed the lower court decision in June 1977. The Louisiana Supreme Court refused to review the case, and on April 17, 1979, the U.S. Supreme Court denied certiorari without comment.

On appeal, the *States-Item* argued that the headline and story should be viewed as a whole in determining whether any libel had been committed. The newspaper claimed that in context, the headline could be understood to essentially repeat what had been said in state officials' letter to Forrest. The Louisiana Court of Appeal did not accept that argument. To do so, it wrote, one would have to believe that "the word 'rigged' was used as a synonym of or a paraphrase of 'proprietary' or 'closed' specifications."[107] The court affirmed the jury verdict.

In *Whitten v. Commercial Dispatch* (1986),[108] the Mississippi Supreme Court found that an accurate story did not mitigate the effect of a headline that wrongly said three men had pleaded guilty to cattle theft. *The Commercial Dispatch* of Lowndes County, Mississippi, accurately reported in s 1981 story that three men had pleaded guilty to federal misdemeanor charges of transporting cattle from Alabama to Mississippi without having the animals tested for brucellosis, a bacterial disease. The headline, however, read "Three Plead Guilty in Cattle Thefts." The men sued the newspaper, claiming they had been libeled. Although the Mississippi Supreme Court noted that "in determining whether a publication is libelous, it must be considered as a whole,"[109] it ruled that "it is possible that an ordinary reader would entertain doubts as to the nature and extent of the plaintiff's criminal involvement because of the erroneous headline."[110] The court remanded the case for trial.

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[107] Forrest v. Lynch, 347 So.2d at 1258.

[108] 487 So.2d 843 (Miss. 1986).

[109] Manasco v. Walley, 63 So.2d at 95, cited in Whitten v. Commercial Dispatch, 487 So.2d at 845.

[110] *Id.*

## Back to *Kaelin*

In *Kaelin v. Globe*, the U.S. Court of Appeals for the Ninth Circuit based its ruling on opinions in two previous Ninth Circuit cases, *Empire Printing Co. v. Roden* (1957)[111] and *Eastwood v. National Enquirer, Inc.* (1997),[112] and two California cases, *Davis v. Hearst* (1911)[113] and *Selleck v. Globe Int'l* (1985).[114] Examination of opinions in those cases reveals that although the court's ruling in *Kaelin* stands out as unusual when compared to rulings on headline libel in many other jurisdictions, it is supported by a clear line of legal reasoning. However, that line of reasoning, as developed by the current Ninth Circuit bench, has ominous overtones for supermarket tabloids *and* more mainstream media.

*Davis v. Hearst.*, the earliest of the cases cited by the *Kaelin* court, grew, in part, out of publication in the *Los Angeles Examiner* of a headline that implied that the mayor of Pasadena had investigated multiple problems with city school board practices[115] when the accompanying accurate article said there was only "one specific matter."[116] The California Supreme Court ruled that "the mere fact that in the body of the article the mayor's investigations are limited to a single charge is not controlling. The captions and headlines are themselves part of the libel."[117] The California Court of Appeals made a similar assertion in *Selleck v. Globe Int'l, Inc.*, filed by the father of actor Tom Selleck over text and headlines that created the false impression he had granted an interview to a supermarket tabloid.[118] The court explained that the "headlines and captions of an allegedly libelous article are regarded as part of the article" and found that "the article, including the headline and caption and taking into account the circumstances of its publication, is reasonably susceptible of a defamatory meaning on its face and therefore is libelous *per se*."[119]

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[111] 247 F.2d 8 (9th Cir. 1957).

[112] 123 F.3d 1249 (9th Cir. 1997).

[113] 116 P. 530 (Cal. 1911).

[114] 212 Cal. Rep. 838 (Cal. Ct. App. 1985).

[115] 116 P. at 535. The series of headlines read, "Mayor Examines the Board of Education's Acts, Exposures Made by 'Examiner' Found to be True, Pasadena Council Will Act."

[116] *Id.* at 549. This was only one count of libel alleged by the plaintiff, who also complained that he was falsely defamed in the text of other stories.

[117] *Id.*

In *Empire Printing Co. v. Roden* , the Ninth Circuit bench of 1957 took that line of reasoning further, stating that a headline could be the entire basis of a libel claim. That case resulted from a story about ferry financing published in the *Alaska Daily Empire* in 1952. The territorial government of Alaska purchased the Chilkoot Ferry, which linked the city of Juneau to the highways of Alaska and the United States, in 1951 after its private owners decided not to continue operating it. For one season, ferry expenses were paid out of the territory's road and harbor appropriations, and ferry revenues were placed into the territory's general fund. That depleted the road and harbor account too quickly, so the next year, a plan was devised to place ferry revenues into an earmarked account, from which expenses also would be paid.[120]

In reporting on the new account, the *Daily Empire* implied that Territorial Gov. Ernest Gruening, Territorial Treasurer Henry Roden, and Territorial Highway Engineer Frank A. Metcalf were guilty of wrongdoing. One headline read: "Gruening, Metcalf, Roden Divert 'Chilkoot' Cash to Private Bank Account." The accompanying story likened the situation to the case of a former territorial treasurer "now serving a prison term . . . for violating the law in the receipt and disbursement of public funds."[121] The officials sued. A jury awarded each $1 in compensatory damages and $5,000 in punitive damages.

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[118] 212 Cal. Rep. at 841. The front-page headline read, "Tom Selleck's love secrets -- By His Father." Inside was a photograph of plaintiff with the caption "His Father Reveals All. " Selleck's father also complained about statements in the article, including this one: "Tom Selleck may be TV's sexiest leading man but his dad says he's really a shy guy so ill at ease with women that he finds it difficult to sustain a lasting relationship."

[119] *Id.* at 844.

[120] 247 F.2d at 10.

On appeal, the Ninth Circuit affirmed the judgments. In tackling the issue of the allegedly libelous headlines, which were only one part of the plaintiffs' complaint, it noted that "[w]hat a newspaper article actually says or carries to its readers must be judged by the publication as a whole."[122] Then, referring to a 1912 Michigan Supreme Court opinion,[123] the Ninth Circuit judges of 1957 produced a seemingly paradoxical statement: "The headlines alone may be enough to make libelous *per se* an otherwise innocuous article." That statement became one basis for the ruling in *Kaelin*, even though it was made in connection with a case that, unlike *Kaelin*, involved both an allegedly libelous headline and allegedly libelous text.

Some observers viewed that reasoning as flawed. Attorney Richard M. Knoth wrote after the *Kaelin* decision that the Ninth Circuit had collapsed two defensible notions into one idea that used "twisted logic."[124] Many courts, including those cited above, have ruled that headlines are integral parts of stories. Other courts, including those that apply the fair index rule, have noted that a headline can be libelous when read in context of the story. However, it does not follow, Knoth wrote, that a headline itself can be the basis for a libel action. "What the two rules should suggest, instead," he wrote, "is that if a headline can become defamatory when read in context with the story, then conversely, a defamatory impression created by a headline can be dispelled by the story."[125]

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[121] *Id.* at 11.

[122] *Id.* at 14.

[123] Gustin v. Evening Press Co., 137 N.W. 674 (Mich. 1912). The Michigan Supreme Court found actionable the headline "Goes to Australia: Alpena Man Turns Over Assents and Seeks New Country." It appeared above a story that apparently accurately reported that the plaintiff, lawyer Harry K. Gustin, planned to visit his brother, the U.S. consul at New Castle, New South Wales, for three or four months "to rest." This could have alarmed creditors to whom, according to the story, Gustin owed $40,000 to $50,000 as the result of poor returns on timber investments. However, the story pointed out that Gustin had assets worth $200,000, was leaving an associate in charge of his business affairs, and "has not defrauded anyone." Nevertheless, the court ruled that the "display headlines contain the sting of the libel" and upheld a ruling for the plaintiff.

[124] Knoth, *Startling 9th Circuit Decision, supra* note 9, at S28.

The *Kaelin* court also took into account the circumstances surrounding the publication, citing its own 1997 ruling in *Eastwood v. National Enquirer, Inc.*[126] That case resulted from the supermarket tabloid's publication of a 1993 article purported in two headlines to be an "Exclusive Interview"[127] with actor Clint Eastwood. Eastwood said he never spoke with the writer whose byline appeared on the story or with a different writer from whose published work the *Enquirer* eventually said it adapted the story. The Ninth Circuit upheld a U.S. District Court ruling for Eastwood, noting in its opinion the manner in which supermarket tabloids are often read: "[T]he editors falsely suggested to the ordinary reader of their publication — as well as those who merely glance at the headlines while waiting at the supermarket checkout counter — that Eastwood had willingly chatted with someone from the *Enquirer*."[128]

In *Kaelin*, the Ninth Circuit made a similar assertion about the layout of supermarket tabloids and the way they usually are displayed that suggests the court wishes to see them as a group of publications for which the normal rules of headline libel may not apply. The court noted that Globe attorneys had argued that the story would clear up any confusion about the meaning of the front-page headline, then wrote:

> The Kaelin story was located 17 pages away from the cover. In this respect, the *National Examiner* front page headline is unlike a conventional headline that immediately precedes a newspaper story, and nowhere does the cover headline

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[125] *Id.*

[126] 123 F.3d 1249 (9th Cir. 1997).

[127] *Id.* 1256.

[128] *Id.* The *Kaelin* court cited a similar case involving a supermarket tabloid, *Selleck v. Globe Int'l*, 212 Cal. Rep. 838 (Calif. Ct. App. 1985), when it discussed how courts should take headlines into account when considering the allegedly defamatory nature of an article. In Selleck, actor Tom Selleck's father sued over an article that created the false impression he had granted an interview to a Globe reporter.

> reference the internal page where readers could locate the article. A reasonable juror could conclude that the Kaelin article was too far removed from the cover headline to have the salutary effect that Globe claims.[129]

That language might have been merely "a swipe at the much-maligned tabloid press."[130] However, it seems to indicate that the Ninth Circuit views headlines that do not immediately precede stories as special cases more likely than "conventional" headlines to be actionable in libel claims. In addition, it appears that the court sees the absence of a reference to the page on which the associated story appears as detrimental to the media defendant's case. As Knoth noted, the language could have detrimental implications for libel claims involving other print and Internet publications.[131] Many print publications run front-page "teaser" headlines referring to articles inside, and such headlines on magazine covers often lack a reference to the page on which the associated article appears. Many Web sites use stand-alone headlines as hyperlinks to the full text of stories, which are published some indefinable virtual "distance" from the headline.

## Conclusion

This paper sought to determine how courts have evaluated allegedly libelous headlines atop accurate stories during the past 35 years, to explore the Ninth Circuit's reasons for ruling in *Kaelin v. Globe Communications Corp.* that headlines could be actionable on their own, and to determine whether that ruling was part of a trend. In the overwhelming majority of the cases examined (20 of 23, or 87 percent), courts read headlines and stories together. In all but two of the cases in which headlines and stories were considered together (18 of 20, or 90 percent), courts ruled in favor of the media defendant. The only cases besides *Kaelin v. Globe* in which headlines were ruled to be actionable on their own were decided in 1977 and 1986 by courts in Louisiana and Mississippi, respectively. That indicates that the Ninth Circuit's ruling in *Kaelin* was not part of a trend.

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[129] Kaelin v. Globe Communications Corp., 162 F.3d at 1041.

[130] Knoth, *Startling 9th Circuit Decision*, *supra* note 9, at S28.

[131] *Id.*

The research also led to other important observations. First, although most courts take a unit approach to allegedly defamatory headlines atop accurate stories, allowing an accurate story to reduce or dispel the harm of a libelous headline, use of the more restrictive "fair index" rule has spread beyond New York, where it was conceived. It is also used in Vermont and in some Michigan courts[132] and was adopted in 1999 by the Indiana Supreme Court. This is significant because the rule imposes a slightly higher standard on media defendants than other variations of the unit rule. Courts that take a classic unit approach may determine that the effect of a false and defamatory headline is reduced or dispelled by the presence of an accurate and non-defamatory story. In contrast, courts that use the fair index rule require that the headline be a fair summary of the accurate story to be found non-actionable.

The implications can be seen in the cases examined for this study. Media defendants won all fourteen cases in which courts used some variation on the unit approach but lost in two of the six cases tried in courts employing the "fair index" rule. In a third fair-index case, the court ruled that the headline was not a fair index of the story. The newspaper defendant won only because the limited-purpose public-figure plaintiff was unable to prove actual malice.

Second, although the research indicates that there is no way to determine which courts will consider headlines to be libelous on their own, California courts and the U.S. Court of Appeals for the Ninth Circuit bear watching. As the Ninth Circuit noted in *Kaelin v. Globe*, California courts have not yet issued an opinion on whether a headline alone can be the basis of a libel lawsuit.[133] The U.S. Ninth Circuit, however, has indicated that it can. In addition, in its *Kaelin* and *Eastwood* rulings the Ninth Circuit showed that it takes seriously the defamatory potential of eye-grabbing headlines on the covers of supermarket tabloids. Given that the Ninth Circuit takes appeals from California courts, in which celebrities often file their libel suits against supermarket tabloids, the appeals court is likely to have other chances to rule on headline libel. Such cases could clarify what appears to be a developing Ninth Circuit theory that allegedly libelous headlines are more likely to be actionable if they appear far from a mitigating story.

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[132] *See* Locricchio v. Evening News Association, 476 N.W.2d 112. This case, and others like it, was not included among the cases analyzed in this paper because the material that was alleged to be defamatory included parts of the story as well as the headline. This paper considered only cases in which the headline alone was alleged to be libelous.

Third, the research shows that stories that traditionally have posed a libel risk for media defendants — those involving allegations of criminal or unethical activity — also pose a risk of headline libel. Nineteen of the 23 cases examined here involved allegations or implications of criminal or unethical behavior by people who appear to have been innocent or in considerably less trouble. This finding has implications for how copy editors should work, particularly when editing stories about criminal or unethical activity. Rather than editing the story, writing the headline, then immediately moving on to the next task, copy editors should pause — if only for a few seconds — to compare the charges and level of fault in the headlines with those cited in the story.

# Hands in the "cookie" jar: Disclosure of Internet transaction generated information under state public records laws

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# Abstract

This paper analyzed whether Internet transaction generated information such as cookie files are subject to disclosure under state freedom of information statutes and whether such information could fall under trade secret exemptions. For states that define public records as those made "in connection with" public business, disclosing cookies makes intuitive sense and is consistent with the legislative intent of broad access. Current laws leave courts ill-equipped to rule on the disclosure of cookie files.

In 1997, Geoff Davidian had an unusual request for the city of Cookeville, Tenn. The editor and publisher of the weekly Putnam Pit newspaper asked for all "cookie" files – small strings of text that certain World Wide Web servers transmit to a browser and store on a computer's hard drive[1] – that were in the city's possession. Davidian saw the cookies as being similar to phone logs and wanted the files to see whether city employees were accessing inappropriate Web sites.[2]

The city refused to allow Davidian access to the cookie files, and he eventually filed suit in United States District Court. In addition to seeking the cookies under the Tennessee Public Records Act, Davidian alleged that the city refused to give the paper a link on its Web page and denied him access to parking ticket records, violating his rights to free speech, due process, and equal protection under the First and Fourteenth Amendments of the Constitution.[3] In September 1998, the court granted the city's motion for summary judgment on the federal issues and dismissed the claim under the state's records act without prejudice.[4]

The purpose of this paper is to analyze the question the federal court left unanswered: Are cookie files and other Internet transaction generated information subject to disclosure under current state freedom of information statutes? This paper will also address whether Internet cookie files could be considered "trade secrets" or confidential commercial information and therefore exempt from disclosure under many state laws.

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[1] Neil Randall, *How Cookies Work*, PC MAG. ONLINE (1997), <http://www8.zdnet.com/pcmag/features/cookie/cks1.htm>. Cookies can be used to store user IDs and passwords, personalize content on web pages, record what an online shopper chose for purchase, and track pages web users access on a site. Many companies use cookie data to build profiles of consumers for displaying targeted ads. *Id.*

[2] *Raiding the Cookie Jar*, 5 MEDIA & THE LAW, Nov. 7, 1997, *available in* Lexis-Nexis Academic Universe. An article in the Putnam Pit said getting the cookie files was necessary to see if city officials "while away work hours surfing Web sites dealing with topics like white supremacy, pornography, white slavery, homosexual lifestyle, communism, satanism, sodomy, bestiality, incest, pedophilia, how to misuse local government authority, adultery, desecration of the United States flag, the anti-Christ, and how to use heroin at work." *Id.*

[3] The Putnam Pit, Inc., et al. v. City of Cookeville, et al., 23 F. Supp. 2d 822 (1998).

[4] *Id.* at 825.

## Background: Access to state public records

Common law generally recognizes a right of citizen access to state public records, but with two major restrictions: The right exists only if the records sought are required to be kept or are specified by statute and if the person requesting the documents is directly affected by the records.[5] In addition, all 50 states have adopted legislation requiring disclosure of public records.[6] Wisconsin was the first state to enact an open records act in 1849;[7] Mississippi was the 50th state to do so in 1983.[8]

Many states relied on the limited common law definition of access until inspired by the 1966 federal Freedom of Information Act.[9] In interpreting the federal statute, the U.S. Supreme Court said:

> The basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.[10]

Most states have preambles to their open records laws that echo the Court's emphasis on government accountability.[11] Indiana's law states, "Providing persons with the information is an essential function of a representative government."[12] Texas' act says, "The people insist on remaining informed so that they may retain control over the instruments they have created."[13]

States vary, sometimes greatly, in the provisions of their open records acts.[14] Generally, states consider the origin of the material and the reason it was made and kept when defining what is a public record.[15] The most liberal definitions include all records in possession of a public agency, regardless of origin or reason for creation or acquisition, unless otherwise provided by statute.[16] The most restrictive states define public records as only those specifically required to be kept by law.[17]

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[5] KENT R. MIDDLETON, et al., THE LAW OF PUBLIC COMMUNICATION 507 (4th ed. 1997).

[6] *Id.*

[7] Matthew D. Bunker, et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U.L. REV. 543, 555 (1993).

[8] MISS. CODE ANN. § 25-61-1 et seq. (West Supp. 1998).

[9] Bunker, *supra* note 7, at 556.

[10] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

[11] Bunker, *supra* note 7.

[12] IND. CODE ANN. § 5-14-3-1 (Michie 1997).

[13] TEX. GOV'T. CODE ANN. § 552.001(a) (West 1999).

[14] Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720, 722 (1981).

Generally, the physical format of the record is not a factor in disclosure under the law. Many state statutes explicitly spell out that if the content falls within the boundaries of the law, it is considered a record "regardless of format or physical characteristics."[18]

In addition, numerous state court decisions[19] and opinions from attorneys general[20] have held that electronic formats are covered under state FOI statutes. However, many states specifically exempt proprietary computer software from disclosure under public record laws.[21]

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[15] *Id.* at 733.

[16] *Id. See also, e.g.,* IOWA CODE ANN. § 22.1(3) (West 1995); MASS. GEN. LAWS ch. 4, § 7 cl. 26 (1999).

[17] *Id.* at 735. *Also, see e.g.* S.D. CODIFIED LAWS § 1-27-1 (Michie 1999).

[18] *See e.g.,* FLA. STAT. ANN. ch. 119.011(1) (West 1999); N.M. STAT. ANN. § 14-2-6(E) (Michie 1995); OR. REV. STAT. § 192.410(6) (1995); R.I. GEN. LAWS §38-2-2(4)(i) (Supp. 1998); TENN. CODE ANN. § 10-7-301(6) (1999); VT. STAT. ANN. tit. 1 § 317(b) (Supp. 1999).

[19] Henry H. Perritt, Jr., *Sources of Rights to Access Public Information,* 4 WM. & MARY BILL OF RTS. J. 179, 191 (1995). *See also, e.g.,* The Tennessean and Frank Sutherland v. Electric Power Board of Nashville, 979 S.W.2d 297 (Tenn. 1998) (holding that a record is broadly defined by the legislature and does not consist of a particular physical format or form, and that allowing an agency to deny a request because the information did not exist in the required format would frustrate the purpose of the Public Records Act "at nearly every turn"); Seigle v. Barry, 422 So. 2d 63 (Fla. Dist. Ct. App. 1982) (holding that "all of the information in the computer, not merely that which a particular program accesses, should be available for examination and copying in keeping with the public policy underlying the right to know statutes"); Stephan v. Harder, 230 Kan. 573, 641 P.2d 366 (Kan. 1982) (finding that computer tapes were public record and that requester was entitled to computer list of names of physicians and amount of public funds paid for abortions); Szikszay v. Buelow, 436 N.Y.S.2d 558, 563 (N.Y. App. Div. 1981) (holding that county assessment rolls in computer tape format must be disclosed under open records law). However, in North Jersey Newspapers Co. v. Passaic County Board of Chosen Freeholders, 601 A.2d 693 (N.J. 1992), the New Jersey Supreme Court said that the legislature did not intend for public records to include "all detailed information a modern computer-based system can generate."

[20] Bunker, *supra* note 7, at 570. *See also, e.g.,* 80 Op. Tenn. Att'y Gen. 125 (1980), Tenn. AG LEXIS 482 (Information stored in a computer but not printed out, which would otherwise be a public record, constitutes a public record); 1985 Fla. Att'y. Gen. Ann. Rep. 3 at 4 (1985), Fla. AG LEXIS 104 (computer tapes were public record, absent a statute exempting content of the records); 81 Op. Md. Att'y Gen. No. 96-016 (1996), Md. AG LEXIS 18 (electronically stored e-mail message or a hard copy of the message is public record if related to public business).

All states provide for exemptions from disclosure. The most common exemptions are for information expressly designated by law as confidential, information concerning law enforcement investigations, commercial information and trade secrets, preliminary departmental memoranda, information deemed to invade personal privacy, and information regarding litigation against a public entity.[22] Exemptions are generally designated as either mandatory (the public body must prohibit disclosure)[23] or discretionary (the agency may deny access if it feels criteria for exemption have been met, but is not obliged to).[24]

**What are cookies?**

The Internet is a global network connecting millions of computers. As of 1998, the Internet had more than 100 million users.[25] The World Wide Web is a system of Internet servers that support specially formatted documents. The documents are written in HTML (HyperText Markup Language), a programming format that supports links to other documents, as well as graphics, audio, and video files. HTML documents allow a person to easily move from one document to another by clicking on a button or linked word. There are several applications called Web browsers that make it easy for individuals to access the World Wide Web; two of the most popular are Netscape Navigator and Microsoft's Internet Explorer.[26]

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[21] *See e.g.*, COLO. REV. STAT. 24-72-202(7) (1999); KAN. STAT. ANN. § 45.221(a)(16) (Supp. 1998); MINN. STAT. ANN. § 13.03(5) (West 1997); OR. REV. STAT. § 268.357(1) (1995).

[22] Braverman & Heppler, *supra* note 14, at 739.

[23] *See e.g.*, ALA. CODE § 36-12-40 (1998); ARK. CODE ANN. § 25-19-105(b) (Michie 1998); KY. REV. STAT. ANN. § 61.878(1) (Michie Supp. 1998).

[24] *See e.g.*, KAN. STAT. ANN. § 45-221(a) (Supp. 1998); NEB. REV. STAT. § 84-712.05 (1994).

[25] Webopedia: Online Computer Dictionary for Internet Terms and Technical Support (visited Oct. 13, 1999) <http://webopedia.internet.com/TERM/I/Internet.html>.

[26] Webopedia: Online Computer Dictionary for Internet Terms and Technical Support (visited Oct. 13, 1999) <http://webopedia.internet.com/TERM/W/World_Wide_Web.html>.

Cookies are a text message given to a Web browser by a Web server. The message is then sent back to the server each time the browser requests a page from the server. The main purpose of cookies is to identify users each time they visit and possibly prepare customized Web pages for them.[27] By recording a person's subsequent visits, how much time he or she spends on each page, and whether the person buys anything, cookies gather valuable information for the company.[28]

Cookies have also been given to computer users by some government Web sites. A 1997 report by OMB Watch, a nonprofit research and advocacy group, found that sites for the Federal Emergency Management Agency (FEMA), National Science Foundation (NSF), and Department of Veterans Affairs were using cookies to find information about those accessing the sites.[29] In June of 2000, the Office of National Drug Control Policy was ordered to stop using cookies to track computer users who viewed the government's anti-drug advertisements on the Internet.[30]

Cookies are stored in different ways depending on the user's computer platform and Web browser. On a computer running Windows and a Netscape browser, cookies are stored in a text file named COOKIES.TXT in the browser directory. On a Macintosh, the text file is named MagicCookie and is in the Netscape preferences folder. A Windows user running Internet Explorer will find cookies as separate files in the WINDOWS/COOKIES directory.

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[27] Webopedia: Online Computer Dictionary for Internet Terms and Technical Support (visited Oct. 13, 1999) <http://webopedia.internet.com/TERM/c/cookie.html>.

[28] *Someone's Watching And It Ain't Big Brother*, TECHCAPITAL, June 24, 1999, *available in* Lexis-Nexis Academic Universe. A web site by The Center for Democracy and Technology <http://snoop.cdt.org/> gives a simple demonstration of how quickly a cookie can reveal information from a personal computer to a Web server. Clicking on the "you" link gives the following readout:

IP Address: -------------
Host Name: -------------
Domain/IP Registered to: -------------
Address: -------------
Browser: -------------
Operating System: -------------
Referring Document: -------------

[29] Stephanie Miles, *Cookies Used on Federal Sites*, CNET NEWS.COM, Nov. 6, 1997, <http://news.cnet.com/news/0-1005-200-323815.html>. According to the article, the NSF had a policy against using cookies but was employing a statistical program that automatically set the cookies. The cookies were programmed to remain on users' hard drives until the year 2010 but were dismantled after the report was released. The Department of Veterans Affairs also blamed the cookies on a software program.

[30] Marc Lacey, *Drug Office Ends Tracking of Web Users*, N.Y. TIMES, June 22, 2000, at A18.

### Literature review

The issue of cookie files as public records has been scarcely mentioned in academic journals or law reviews. Several attorneys and experts weighed in on the subject as the Cookeville case was going to court, however.

Albert Gidari Jr., an attorney who lectures on legal technology issues, likened cookie files to telephone records and said such data were important so citizens could examine the spending habits of government. "If the city has installed a T-1 line because someone is looking at sex videos on the Internet," he said, taxpayers might want a slower, less expensive line installed instead.[31]

Jane Kirtley, director of the Reporters Committee for Freedom of the Press, said, "A logical analogy to access to cookie files is access to government employees' cell-phone records, which are available in most jurisdictions." But she added that the biggest question may be who owns cookies: the user or the Web server that creates them.[32]

However, other legal observers noted that if the cookie files include passwords, they might fall under privacy exemptions. "You don't give up all privacy rights just because you work for the government," said Christopher A. Hansen, a senior staff counsel for the American Civil Liberties Union.[33]

Other experts such as K.C. Sheehan, a professor at Southwestern University

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[31] Wendy R. Leibowitz, *Cyberspace Is Reshaping Free Speech*, THE NATIONAL LAW JOURNAL, Dec. 1, 1997, at A6, *available in* Lexis-Nexis Academic Universe.

[32] *Raiding the Cookie Jar*, *supra* note 2.

[33] Leibowitz, *supra* note 31.

School of Law in Los Angeles who has studied personal jurisdiction in cyberspace, emphasized the unique nature of cookie files. "The thing that strikes me is it's neither like personal notes nor like phone notes," she said. "If you get someone's cookie file it's fairly simple to figure out what they saw. It's a good deal more intrusive than getting a list of telephone numbers."[34]

Several authors in law journals have discussed cookies in terms of privacy concerns or discovery in civil or criminal trials. Sessler focused on privacy, particularly the use of computers by government and industry to collect and store information about individuals.[35] He argued for new legislation and for expanding privacy protection to include tort and property rights to punish the non-consensual use of computer transaction generated information such as cookies.[36]

Johnson emphasized that digital data are "discoverable if relevant," including not only cookies but cached Web pages (previously viewed pages still on the user's hard drive) and Web bookmarks, which are used to access often-used pages.[37] Johnson put digital data in four classifications: active (created by individuals in specific applications), inactive (not used regularly but still residing on a disk), archival (data that have been copied for safe-keeping), and residual (including "deleted" files that are still retrievable on disk).[38] He also noted that digital data could occupy each of the four categories in a short period of time – often without the knowledge of the user – and that all four classes of data were discoverable.[39]

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[34] Ben Sullivan, *Civil Servants' Net Use Litigated; Case Tests Right to See Hidden Files*, LOS ANGELES DAILY NEWS, Nov. 6, 1997, at B1.

[35] Joshua B. Sessler, *Computer Cookie Control: Transaction Generated Information and Privacy Regulation on the Internet*, 5 J.L. & POL'Y 627 (1997).

[36] *Id*. at 676.

[37] Gregory S. Johnson, Esq., *Symposium: Emerging Technologies and the Law: A Practitioner's Overview of Digital Discovery*, 33 GONZ. L. REV. 347, 368-69 (1997/1998).

[38] *Id*. at 359-62.

[39] *Id*. at 363. Johnson points out that data which could decide a case are modified or overwritten on a continual basis, therefore it is crucial that steps are taken to preserve data in all four categories.

Boxer illustrated how cookies could be used by both prosecuting and defense attorneys in criminal and civil litigation.[40] He noted that a subpoena calling for the production of all cookie files from a person's computer could be equated to asking for an entire file cabinet and quashed as overbroad.[41]

Others have focused on how the law has lagged badly behind rapidly advancing technology. Sanders noted, "Laws that were developed for paper records don't quite fit computer records."[42] Sanders proposed that citizens be given on-site access to electronic public information free of change and that copies of public electronic data should be available for a reasonable fee.[43] Sanders also noted that computers tend to pool public records with personal data, which makes it difficult to ensure access without violating privacy of government employees.[44]

Dillon criticized the "piecemeal approach" of applying access law to electronic records[45] as exemplified in *Brown v. Iowa Legislative Council*,[46] in which the Iowa Supreme Court held that legislative redistricting data prepared by an outside vendor and the software that made the data accessible fell under the trade secret exemption.[47] Dillon was concerned that the decision would give vendors unfettered discretion to invoke trade secret exemptions for the software, making the public information practically undisclosable as well.[48] Dillon advocated that government agencies clearly indicate whether computer programs and the specific "pools of information they create" are public records, and that agencies put information on network servers so citizens could access public data while still protecting commercial interests of vendors.[49]

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[40] Nelson A. Boxer, *Using "Cookies" in Litigation*, New York Law Journal, Apr. 13, 1999, at 5, *available in* Lexis-Nexis Academic Universe. As Boxer points out, if a person is being investigated for fraud, a roadmap of what financial institutions that person visited could be very useful to a prosecutor. On the other hand, proof that an investor accessed a certain Web page that disclosed the risks associated with a particular investment could be helpful to the defense.

[41] *Id.* Boxer analyzes *re Grand Jury Subpoena Duces Tecum Dated November 15, 1993*, 846 F.Supp. 11 (S.D.N.Y. 1994), in which a federal district court ruled that a federal grand jury subpoena of a corporation demanding hard drives and "all computer-accessible data (including floppy diskettes) created by any of the specified officers and employees or their assistants" was unreasonably broad.

[42] Sandra Sanders, *Arizona's Public Records Laws and the Technology Age: Applying "Paper" Laws to Computer Records*, 37 Ariz. L. Rev. 931 (1995).

[43] *Id.* at 932.

[44] *Id.* at 941.

[45] Elizabeth M. Dillon, *Brown v. Iowa Legislative Council: Struggling with the Application of the Freedom of Information Act to Computerized Government Records*, 13 J. Marshall J. Computer & Info. L. 123 (1994).

[46] 490 N.W.2d 551 (Iowa 1992).

[47] *Id.* at 554.

Bunker et al. recognized the immense power of computers to make information available to the public and recommended a set of guidelines for public access to electronic data. Among the suggestions were building public access into new government computer systems or upgrades, cataloging nonexempt public information stored in computers, mandating that exemptions for withholding computer records be the same as for paper records, and keeping costs of records reasonable, even when available only through private vendors.[50]

A few authors have addressed electronic mail as public record. Hunter noted that e-mail had characteristics of both written and telephone communications, and that access laws were adopted on the general assumption that phone conversations would be private and written communications would be public.[51] While conceding that public access to e-mail could damage candor and ease of communication among officials, Hunter argued that e-mail created by public agencies should be subject to disclosure.[52] However, he recommended amending a standing Michigan FOIA exemption to include "consultative" e-mail exchanges that resembled informal exchanges of ideas that occur on the telephone.[53]

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[48] Dillon, *supra* note 45, at 127.

[49] *Id.* at 142.

[50] Bunker, *supra* note 7, at 596-98.

[51] Daniel F. Hunter, *Electronic Mail and Michigan's Public Disclosure Laws: The Argument for Public Access to Governmental Electronic Mail*, 28 U. MICH. J.L. REF. 977, 1009 (1995).

[52] *Id.* at 977.

[53] *Id.* at 1011.

Petersen and Roberts, in examining Florida's access laws, noted that debate is generally not about the status of e-mail as public record, but instead focuses on archival issues and practical concerns about providing access to citizens.[54] Privacy of e-mail correspondence in the workplace has been the focus of other authors. Lee looked at the legality of employer monitoring of employee e-mail.[55] Lee proposed federal legislation that would require employers monitoring employee e-mail to have a "legitimate business purpose," use the least intrusive means, limit access and disclosure of the information, and give notification of the monitoring and use.[56]

Winters noted that existing legal protections for privacy, based on actual physical invasions, is often inappropriate for actions concerning the Internet since intrusions are difficult to observe through the five senses.[57] As a result, courts tend to defer to legislatures when no law has been passed to specifically address new privacy concerns a new technology brings, therefore often favoring interests of the employer by default.[58]

Privacy of commercial and financial information has been the focus of other authors. Chamberlain argued for a specific trade secret exemption to Florida's open record laws, arguing that such an amendment "would not allow the interests of open government to destroy the interest of the marketplace competitor."[59] Sessler argued that transaction-generated computer information such as cookies could be considered trade secrets if obtaining information from networks was considered an individual's "business."[60]

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[54] Barbara A. Petersen and Charlie Roberts, *Access to Electronic Public Records*, 22 FLA. ST. U.L. REV. 456 (1994). A Florida state attorney's office had the practice of recording over archives of e-mail messages after two weeks. In contrast, one county administrator provides public access to archived, indexed e-mail messages though a software program. *Id.* at 457.

[55] Laurie Thomas Lee, *Watch Your Employee E-Mail Monitoring and Privacy Law in the Age of the "Electronic Sweatshop,"* 28 J. MARSHALL L. REV. 139, 140 (1994).

[56] *Id.* at 172.

[57] Steven B. Winters, *Do Not Fold, Spindle or Mutilate: An Examination of Workplace Privacy in Electronic Mail*, 1 S. CAL. INT. L.J. 93, 94 (1992).

[58] *Id.* at 130.

[59] Patricia E. Chamberlain, *Article: The Public Records Act: Should Trade Secrets Remain in the Sunshine?* 18 FLA. ST. U.L. REV. 559, 577 (1991).

Although there have been many studies on public record laws and a significant number of articles on legal aspects of computer communication, the review of literature indicates that there has been a lack of scholarship on the issue of cookie files as public records. This paper will be a first step in bridging this gap.

**Method and limitations**

The purpose of this paper is to determine whether cookie files are subject to disclosure under current state freedom of information statutes. The following specific questions will be addressed:

1) Do cookies meet the definition of public records under state laws?

For this question, state public records laws were analyzed under the framework of Braverman and Heppler, who classified state definitions as either allowing liberal disclosure or being more restrictive.[61] The most liberal laws define all records in the possession of a public body, regardless of origin or reason for creation or acquisition, as public records unless otherwise specified.[62] The other category of liberal definitions state that any record made or received in connection with the transaction of public business or any record containing information regarding those matters is a public record.[63]

Restrictive states define public records as only those required to be kept by law or those made pursuant to statute or ordinance.[64]

2) Could cookies, as Sessler argued, be considered "trade secrets" or

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[60] Sessler, *supra* note 35, at 673-74.

[61] Braverman, *supra* note 14, at 733-4.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 735.

confidential commercial information,[65] making them exempt under state public records acts?

This question analyzed state statutory trade secret exemptions, along with relevant interpretations of exemptions from state case law and attorneys general opinions, to determine whether cookies on government computers could be withheld from public record disclosure.

This study has limited its scope to trade secret exemptions; the applicability of privacy exemptions to the disclosure of cookie files is the next important issue to be explored by legal researchers.

### Definitions of public records under state laws

In 1981, Braverman's classification of public records laws found that nine states had restrictive public records definitions: Records were considered to be public only if they were required to be kept by law or were kept pursuant to statute or ordinance.[66] In contrast, only two states – New Jersey and South Dakota – have restrictive definitions today.[67] Under South Dakota law, "if the keeping of a record ... is required of an officer or public servant under any statute," it is considered a public record.[68] New Jersey's Right to Know Law covers "all records that are required by law to be made, maintained or kept on file."[69] Courts have recognized that access to records under New Jersey's statute is narrower than what is available under the common law.[70]

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[65] Sessler, *supra* note 60.

[66] *Id*. However, Braverman noted that the definitions aren't by themselves an accurate predictor of disclosure because, among other factors, records are also subject to exemptions within FOI laws and other state statutes that may prohibit disclosure. *Id*. at 733.

[67] N.J. STAT. ANN. § 47:1A-2 (West Supp. 1999); S.D. CODIFIED LAWS § 1-27-1 (Michie Supp. 1999).

[68] S.D. CODIFIED LAWS ANN. § 1-27-1 (Michie Supp. 1999).

[69] N.J. STAT. ANN. § 47:1A-2 (West Supp. 1999).

[70] Kuehne Chemical Co., Inc. v. North Jersey Dist. Water Supply Comm'n., 693 A.2d 168, 171 (N.J. Super. Ct. App. Div. 1997).

Fourteen states have the most liberal definitions of public records: all records in the possession of a public body, regardless of origin or reason for creation or acquisition, unless otherwise specified by statute.[71] These states do not make the record's reason for creation or use a condition for being deemed as public. For example, Minnesota law defines "government data" as "all data collected, created, received, maintained or disseminated by any state agency ... regardless of its physical form, storage media or conditions of use."[72] Wisconsin defines public records as "any material ... which has been created or is being kept by an authority."[73]

Courts and attorneys general have broadly applied these types of statutes. For example, the South Carolina attorney general determined that phone bills of a public agency are considered public records, saying "[W]here an agency is public, and the public supports its use of a telephone, it makes no sense that the public cannot see how and when that telephone is used."[74] Similarly, the Wisconsin attorney general ruled that records of the state assembly's telephone credit card numbers and of long-distance telephone calls by representatives were subject to the public records law.[75]

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[71] Haw. Rev. Stat. § 92F-3 (1993); 5 Ill. Comp. Stat. 140/2(c) (West 1999); Ind. Code § 5-14-3-2 (1999); Iowa Code Ann. § 22.1(3) (West 1995); Kan. Stat. Ann. § 45-217(f)(1) (Supp. 1998); Mass. Gen. Laws Ann. ch. 4, § 7, cl. 26 (West 1999); Minn. Stat. Ann. § 13.02(7) (West 1997); Neb. Rev. Stat. § 84-712.01.(1) (1994); N.Y. Pub. Off. Law § 86(4) (1988); Nev. Rev. Stat. § 239.010(1) (1994); Ohio Rev. Code Ann. §149.43(A)(1) (West 1999); S.C. Code Ann. § 30-4-20(c) (Law Co-op. 1990); Utah Code Ann. § 63-2-103(18) (1997); Wisc. Stat. Ann. § 19.32(2) (West 1999).

[72] Minn. Stat. Ann. § 13.02(7) (West 1997).

[73] Wisc. Stat. Ann. § 19.32(2) (West 1999).

[74] Op. S.C. Att'y. Gen. No. 93-17 (1993).

[75] 66 Op. Wis. Att'y. Gen. 202, 977 Wisc. AG LEXIS 37 (1977).

Thirty-four states define documents as public records if they are in connection with the transaction of public business.[76] For example, Delaware's law defines public records as "information of any kind ... otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest."[77] Idaho defines public records as "any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any state or local agency."[78]

A number of state courts have broadly interpreted these types of public record laws. In *Grand Forks v. Grand Forks Herald, Inc.*,[79] the North Dakota Supreme Court said:

> A state legislature in a statute concerning access to public records which provides that except as otherwise specifically provided by law, all records of public or governmental bodies ... shall be public records, open and accessible for inspection during reasonable office hours, intended to give the term "records" an expansive meaning.[80]

Courts have noted the importance of access to records that concern the expenditure of public funds and performance of public employees. In *Athens*

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[76] ALA. CODE § 36-12-40 (1998); ALASKA STAT. § 09.25.220(3) (Michie 1998); ARIZ. REV. STAT. ANN. § 39-121.01(B) (West 1996); ARK. CODE ANN. § 25-19-103(1) (Michie 1996); CAL. GOVT CODE § 6252(e) (West 1995); COLO. REV. STAT. § 24-72-202(6)(a)(I) (1999); CONN. GEN. STAT. ANN. § 1-200(5) (West 1999); DEL. CODE ANN. tit. 29 § 10002(d) (1997); FLA. STAT. ANN. § 119.011(1) (West 1999); GA. CODE ANN. § 50-18-70(a) (1999); IDAHO CODE § 9-337(10) (1998); KY. REV. STAT. ANN. § 61.870(2) (Michie Supp. 1998); LA. REV. STAT. ANN. § 44:1(2) (West 1982); ME. REV. STAT. ANN. tit. 1, § 402 (3) (West 1998); MD. CODE ANN. STATE GOV'T. § 10-611(g)(i) (1999); MICH. STAT. ANN. § 4.1801(2)(e) (Law Co-op. 1997); MISS. CODE ANN. § 25-61-3(b) (Supp. 1998); MO. ANN. STAT. § 610.010(6) (West Supp. 1999); MONT. CODE ANN. § 2-6-202(1) (1999); N.H. REV. STAT. ANN. § 91-A:4 (Supp. 1999); N.M. STAT. ANN. § 14-2-6(E) (Michie 1995); N.C. GEN. STAT. § 132-1(a) (1995); N.D. CENT. CODE § 44-04-17.1(15) (Supp. 1999); OKLA. STAT. ANN. tit. 51 § 24A.3(1) (West 2000); OR. REV. STAT. 192.005 (5) (1995); PA. STAT. ANN. tit. 65 § 66.1(2) (West 1996); R.I. GEN. LAWS § 38-2-2(4)(i) (Supp. 1998); TENN. CODE ANN. § 10-7-301(6) (1999); TEX. GOV'T. CODE ANN. § 552.002(a) (West 1999); VT. STAT. ANN. tit. 1 § 317(b) (Supp. 1999); VA. CODE ANN. § 2.1-341 (Michie Supp. 1999); WASH. REV. CODE ANN. § 42.17.020(36) (West 1999); W. VA. CODE § 29B-1-2(4) (1998); WYO. STAT. ANN. § 16-4-201(a)(v) (Michie 1999).

[77] DEL. CODE ANN. tit. 29 § 10002(d) (1997).

[78] IDAHO CODE § 9-337(10) (1998).

[79] 307 N.W.2d 572 (N.D. 1981).

[80] *Id.*

*Observer Inc. v. Anderson,*[81] the Georgia Supreme Court, rejecting the state's argument that negative comment on one's profession constitutes an invasion of personal privacy, said:

> The purpose (of a state open records act) is not only to encourage public access to information in order that the public can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions but also to foster confidence in government through openness to the public. That the information may comment upon certain public officials' performance of their official duties does not warrant suppression by the courts.[82]

The Rhode Island Supreme Court in *Providence Journal Co. v. Sundlun* [83] recognized the importance of access, but not without limits: "The legislature does not intend to empower the press and the public with carte blanche to demand all records held by public agencies."[84] Similarly, courts have also put limits upon custodians who wished to close entire categories of records. In *Sheridan Newspapers, Inc. v. City of Sheridan,* the Wyoming Supreme Court held that police logs could not be closed categorically and that exemptions must be taken up case-by-case.[85] A variety of factors are considered when determining whether a record was "in connection with" official business. In *Griffin v. City of Knoxville,* the Tennessee Supreme Court said such a test "requires an examination of the totality of the circumstances."[86]

The difficulty in determining what is disclosable under these types of public record laws is illustrated by Arizona's statute, which requires that "public records and other matters in the office of any officer" be open, but defines neither "public record" nor "other matter."[87] State courts have interpreted those terms, and not always in favor of disclosure. In *Salt River Pima-Maricopa Indian Community v. Phoenix Newspapers, Inc.,*[88] the Arizona Supreme Court found that a check distribution list – found in the state treasurer's office but not part of its records – that contained personal information about an Indian community's members was not a public record.[89] The court emphasized, "It is the nature and purpose of the document, not the place where it is kept, which determines its status."[90] The court also found that the list was not an "other matter," covered under the open records law since there was no statute that connected the list with any state official, and because the state treasurer did not compile the list or do any business with the list.[91]

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[81] 263 S.E.2d 128 (Ga. 1980).
[82] *Id.* at 130.
[83] 616 A.2d 1131 (R.I. 1992).
[84] *Id.* at 1134.
[85] 660 P.2d 785, 795 (Wyo. 1983).
[86] 821 S.W.2d 921, 924 (Tenn. 1991).
[87] ARIZ. REV. STAT. ANN. § 39-121 (West 1996).

In a similar manner, courts have applied a nexus test to determine public record status under the federal Freedom of Information Act. In *Bureau of National Affairs, Inc., v. United States Department of Justice,*[92] the Court of Appeals for the District of Columbia Circuit "looked to see if there was 'some "nexus" between the agency and the documents other than the mere incidence of location.' "[93] The court emphasized that possession of a record by an agency was not enough to make it a public record.[94]

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[88] 815 P.2d 900 (Ariz. 1991).

[89] *Id.* at 908. Under Arizona law, a public record is one that is 1) "made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference"; 2) "required to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done"; or 3) any "written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by . . . law or not . . . ." *Id.* at 907-08 (citations omitted).

[90] *Id.* at 907.

[91] *Id.* at 909. The court said that in particular importance in determining "other matter" status is "whether the document is held in the official capacity of the state officer; and, if so, whether the public has a legitimate interest in the document that outweighs any governmental promise of confidentiality that has been made." *Id.* at 908.

[92] 742 F.2d 1484 (D.C. Cir. 1984).

[93] *Id.* at 1491 (quoting Wolfe v. United States Dep't. of Health and Human Servs., 711 F. 2d 1077, 1080 (D.C. Cir. 1983)).

[94] *Id.* (citing Illinois Inst. for Continuing Legal Educ. v. United States Dep't. of Labor, 545 F. Supp. 1229, 1233-34 (N.D. Ill. 1982)).

By looking at the "totality of the circumstances," courts have distinguished between similar types of communication. Two instances concerning access to government e-mail illustrate this point. In Florida, the attorney general ruled that e-mail messages made or received by employees of a property appraiser's office made in the connection with official business were public records.[95] However, in *The State Ex Rel. Wilson-Simmons v. Lake County Sheriff's Department*,[96] the Ohio Supreme Court found that allegedly racist e-mails by corrections officers were not public records. In the ruling, the court said, "There is no evidence or allegation that the alleged racist e-mail documented sheriff's department policy or procedures. It was allegedly circulated only to a few co-workers and was not used to conduct sheriff's department business."[97] The court expressed a reluctance to close entire categories of records, rejecting the sheriff's department's broader assertion that no public office e-mail would ever be public records.[98]

**Trade secret exemptions to freedom of information laws**

Trade secret laws enable companies to protect valuable but non-patentable innovations, providing for injunctive or monetary relief if a person misappropriates a trade secret.[99] The federal FOIA includes an exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[100] The federal FOIA does not define "trade secret," but courts have relied on the definition in the First Restatement of Torts: "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."[101] The First Restatement of Torts also identified six factors in determining whether information was a trade secret:

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[95] Op. Fla. Att'y. Gen 96-34, 1996 Fla. AG LEXIS 25 (1996).

[96] 693 N.E.2d 789 (Ohio 1998).

[97] *Id.* at 793.

[98] "Sometimes, public office e-mail can document the organization, functions, policies, decisions, procedures, operations, or other activities of the public office." *Id.*

[99] Christopher Rebel J. Pace, *The Case for a Federal Trade Secrets Act*, 8 HARV. J.L. & TECH. 427, 435 (1995).

[100] 5 U.S.C. § 552(b)(4) (1994).

> 1. the extent to which the information is known outside the particular business,
> 2. the extent to which it is known by employees and others involved in the particular business,
> 3. the extent of measures taken by the business to guard the secrecy of the information,
> 4. the value of the information to the particular business and to its competitors,
> 5. the amount of effort or money expended by the particular business in developing the information, and
> 6. the ease or difficulty with which the information could be properly acquired or duplicated by others.[102]

The definition of a trade secret was refined in the Uniform Trade Secrets Act, which was drafted by the National Conference of Commissioners on Uniform State Laws to better define what forms of information constitute protectable trade secrets. Forty states have statutes based on the USTA, which defines a trade secret as:

> [i]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from no being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. . . [103]

The Restatement (Third) of Unfair Competition simplified determination of a trade secret: "A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."[104]

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[101] Restatement of Torts § 757 cmt. b (1939).
[102] *Id.*
[103] UTSA 1(4) (amended 1985), 14 U.L.A. 433, 438 (1990).
[104] Restatement (Third) of Unfair Competition 39 (1995).

Thirty-four state public record laws have express trade secret exemptions.[105] Some states include a "substantial injury test," such as New York's law which exempts: "trade secrets ... which if disclosed would cause substantial injury to the competitive position of the subject enterprise."[106] Oregon takes a slightly different approach, exempting information which "gives its user an opportunity to obtain a business advantage over competitors who do not know or use it."[107] Nebraska's statute expressly recognizes the balancing act between access and confidentiality by exempting trade secrets "which if released would give advantage to business competitors and serve no public purpose."[108] Courts have also agreed that companies claiming trade secrets bear the burden of proof. The West Virginia Supreme Court ruled that companies must establish "a credible showing of likely harm" by disclosure of a trade secret.[109] Trade secret exemptions are most commonly sought by corporations, but in states that have adopted the Uniform Trade Secrets Act, courts have ruled that government entities can have trade secrets also. [110]

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[105] Ark. Code Ann. § 25-19-105(b)(9)(A) (Michie 1996) ("files which, if disclosed,would give advantage to competitors or bidders"); Cal. Govt Code § 6254(k) (West 1995) ("records the disclosure of which is exempted or prohibited pursuant to ... provisions of the Evidence Code relating to privilege"); Colo. Rev. Stat. § 24-72-204(3)(a)(IV) (1999) ("privileged information and confidential commercial, financial, geological or geophysical data furnished by or obtained from any person"); Conn. Gen. Stat. Ann. § 1-210(b)(5) (West 1999) ("trade secrets ... defined as unpatented, secret, commercially valuable plans, appliances, formulas, or processes"); Del. Code Ann. tit. 29 § 10002(d)(2) (1997) ("trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature"); Ga. Code Ann. § 50-18-72(b)(1) (1999) ("trade secrets obtained from a person or business entity which are of a privileged or confidential nature and required by law to be submitted to a government agency"); Idaho Code § 9-340 (D)(1) (1999) ("trade secrets, including those contained in response to public agency requests"); 5 Ill. Comp. Stat. 140/7(1)(g) (West 1999) ("trade secrets and commercial or financial information"); Ind. Code § 5-14-3-4(4) (Supp. 1999) ("records containing trade secrets"); Iowa Code Ann. § 22.7(3) (West 1995) ("trade secrets which are recognized and protected as such by law"); Kan. Stat. Ann. § 45-221 (2) (Supp. 1998) ("records which are privileged under the rules of evidence"); La. Rev. Stat. Ann. § 44.4(13)(b) (West 1999) ("any financial or trade secrets ... of any person, firm, corporation, agency or other entity"); Md. Code Ann. Govt § 10-617(d) (Supp. 1999) ("trade secrets and confidential commercial, financial, geological or geophysical information"); Mass. Gen. Laws ch. 4 § 7 cl. 26 (g) (1999) ("trade secrets or commercial or financial information"); Mich. Stat. Ann. § 4.1801(13)(9) (1997) ("trade secrets ... for use in developing governmental policy"); Minn. Stat. Ann. § 13.37(b) (West 1997) ("trade secret information" defined as general nonpublic data); Miss. Code Ann. § 25-61-9(1) (Supp. 1998) ("trade secrets or confidential commercial or financial information"); Mo. Rev. Stat. § 610.021(15) (Supp. 1999) ("records relating to scientific and technological innovations in which the owner has a proprietary interest may be closed"); Neb. Rev. Stat. § 84-712.05(3) (Supp. 1998) ("trade secrets ... which if released would give advantage to business competitors and serve no public purpose"); N.H. Rev. Stat. Ann. § 91-A:5(IV) (Supp. 1999) ("confidential, commercial or financial information"); N.M. Stat. Ann. § 14-2-1(6) (Michie 1995) ("trade secrets"); N.Y. Pub. Off. Law § 87(2)(d) (McKinney 1999) ("trade secrets ... which if disclosed would cause substantial injury to the competitive position of the subject enterprise"); N.C. Gen. Stat. § 132-1.2(1) (1995) (agency may withhold information which constitutes a "trade secret"); N.D. Cent. Code § 44-04-18.4(1) (Supp. 1999) ("trade secrets, proprietary, commercial and financial information"); Ohio Rev. Code Ann. § 1333.61(D) (1999) ("any business information or plans, financial information"); Okla. Stat. Ann. tit. 51 § 24A.19 (West 2000) ("information related to research ... including, but not limited to, trade secrets and commercial or financial information"); Or. Rev. Stat. § 192.501(2) (1995) ("trade secrets ... having actual or potential commercial value"); R.I. Gen. Laws § 38-2-2(4)(B) (Supp. 1998) ("trade secrets and commercial or financial information ... which is of a privileged or confidential nature"); S.C. Code Ann. § 30-4-40(a)(1) (Law. Co-op. 1990) (trade secrets defined as unpatented, secret, commercially valuable plans, appliances or processes); Tex. Gov't. Code Ann. § 552.110(a) (West 1999) ("a trade secret ... privileged or confidential by statute or judicial decision"); Vt. Stat. Ann. tit. 1 § 317(c)(9) (Supp. 1999) ("trade secrets ... known only to certain individuals within a commercial concern"); W. Va. Code § 29B-1-4(1) (1998) ("trade secrets ... having commercial value, and which gives its users an opportunity to obtain business advantage"); Wisc. Stat. Ann. § 19.36(5) (West 1996) ("information qualifying as a trade secret"); Wyo. Stat. Ann. § 16-4-203(d)(v) ( Michie 1999) ("trade secrets, privileged information and confidential commercial, financial, geological or geophysical data"). However, many states have exemptions scattered throughout their statutes. For example, Florida has more than 400 exemptions to its open government laws, 27 of which pertain to trade secrets. Chamberlain, *supra* note 58, at 563.

Trade secret exemptions to state public record laws have two common characteristics. First, the information must have value derived from it being a secret and must give the holder a competitive economic advantage. Second, those claiming trade secret status must have attempted to keep the information secret. The USTA's requirement that trade secrets must be subject to "reasonable efforts" to maintain secrecy is echoed in many state FOI statues. North Carolina requires an entity claiming trade secret status to designate the information as such "at the time of its initial disclosure to the public agency."[111] The Minnesota Supreme Court in *Jostens, Inc. v. National Computer Systems, Inc.* found that a computer-aided design and manufacturing system was not a trade secret, in part, because the company did not mark any of the software tapes or documents as "secret" or "confidential" until after litigation had begun.[112] In *Brown*, a company's declaration in contracts that its services and information were trade secrets was found to establish "reasonable efforts to preserve secrecy."[113]

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[106] N.Y. PUB. OFF. LAW § 87(2)(d) (McKinney 1999).

[107] OR. REV. STAT. § 192.501(2) (1995).

[108] NEB. REV. STAT. § 84-712.05(3) (Supp. 1998).

[109] AT&T Communications of West Virginia v. Public Service Commission of West Virginia, 423 S.E.2d 859, 862 (1992).

[110] *See e.g.,* Besser v. Ohio State University, 721 N.E.2d 1044, 1050 (Ohio 2000); Scientific Games, Inc. v. Dittler Bros., Inc., 586 So. 2d 1128, 1131 (Fla. App. 1991); Progressive Animal Welfare Society v. Univ. of Washington, 884 P.2d 592 (Wash. 1994).

[111] N.C. GEN. STAT. § 132-1.2(4) (1995).

A federal case, *Defiance Button Machine Co. v. C&C Metal Products Corp.*,[114] gave some guidance as to what constitutes reasonable efforts to maintain secrecy of computer data. The court said the plaintiff, who was selling his company to the defendant, could not claim trade secret status for a customer list since computer discs containing the information were left within reach of the defendant, and file names and passwords were readily accessible at the plaintiff's former plant.[115]

**Analysis**

Since no state has ruled on a case such as *The Putnam Pit, Inc.*, predicting whether states would allow disclosure of Internet cookie files under public record laws is difficult. However, looking at trends and general characteristics of state public record laws gives some direction as to how courts and attorneys general might approach the question.

Since cookies are obviously not required to be kept, it is highly doubtful that states with restrictive definitions would compel agencies to disclose their cookie files. However, cookies would seem to have a high likelihood of being public records in liberal disclosure states: All records in the possession of a government agency are public regardless of the reason for creation unless otherwise specified by statute.

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[112] 318 NW 2d. 691, 701 (Minn. 1982).
[113] 490 N.W.2d 551, 554 (Iowa 1992).
[114] 759 F. 2d 1053 (1984).
[115] *Id.* at 1063.

It is most difficult to project whether cookies meet the criteria in states that define public records as those made "in connection with" public business. Following the legal reasoning in cases such as *Sheridan Newspapers, Inc.,*[116] and *Lake County Sheriff's Department,*[117] courts would likely reject arguments that cookies would never be disclosable and decide access on a case-by-case basis.

Crucial to the decision would be how the court perceived the nature and purpose of cookie files. If cookies were seen as merely a byproduct of computer mediated communication and not a means of formulating an agency's policies or disseminating information, it is conceivable that they would be ruled outside the scope of the state's public record definition. However, if the primary function of cookie files were perceived as the tracking of the use of Internet resources by government, courts could follow precedents such as those opening telephone records to disclosure in South Carolina and Wisconsin.[118] Treating cookie files in much the same manner as phone records not only makes intuitive sense but is consistent with the legislative intent of the broadest access possible under public record laws.

Since no court has been asked to determine whether Internet cookies constitute trade secrets, one can only speculate as to whether cookie files could be exempted under public record laws for that reason. However, cookies seem to fail both parts of the USTA test of a trade secret. Companies that place cookies on client computers would have difficulty arguing that the files have independent economic value by being secret. Cookies are used to enhance the browsing experience for a particular Web user on a particular Web site and can generally be read only by the entity that wrote it initially.[119] Therefore, a company would seem to have little to lose if a cookie were disclosed from a customer's computer. The "value" of cookies is in their ability to help compile an aggregate of data about the customer – an aggregate that resides on company servers, not the individual customer's cookie file. A company would gain little competitive advantage by obtaining a cookie from the customer of a competitor; the company would still not have access to the tracking data the competitor has compiled with the help of cookies over numerous consumer visits to the Web site. Nor can cookies lure Web surfers to a site; they can only track activity once the surfer gets there. And once there, it is relatively easy, and very inexpensive, for a company to send the surfer a cookie of its own. However, it is conceivable that a government entity in a jurisdiction that has adopted the USTA could successfully claim that cookies residing on its computers do have independent economic value by being secret, particularly if the cookies contain passwords or other information used to gain access to valuable services and, as Sessler noted, if obtaining information from computer networks was considered the entity's "business."

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[116] 660 P.2d 785, 795 (Wyo. 1983)

[117] 693 N.E.2d 789, 793 (Ohio 1998).

[118] *See e.g.,* Op. S.C. Att'y. Gen. No. 93-17 (1993); 66 Op. Wis. Att'y. Gen. 202, 977 Wisc. AG LEXIS 37 (1977).

However, it is highly doubtful that courts would find that either companies or government entities take reasonable measures of secrecy with cookies. Rarely, if ever, do Web sites make any declaration that cookies are secret or confidential. Cookies are not encrypted or otherwise protected as are other online transactions like credit card purchases. The manner of storage – not on a protected company server but easily accessible on the customer's hard drive – would seem to preclude any claim to secrecy. It is conceivable a company could argue that the very fact a cookie is only usable by the Web site that created it makes the cookie "secret" from other sites. However, the lack of more explicit measures to ensure secrecy would make it unlikely a company could successfully claim trade secret status for cookies of individual web users.

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[119] Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1228 (1998). However, companies such as DoubleClick blur this distinction. DoubleClick places advertisements and cookies on more than 1,500 sites that subscribe to its service, including AltaVista and the New York Times; many users of those sites never know DoubleClick left a cookie. DoubleClick caused a furor in 1999 when it announced it would combine personal consumer information purchased from Abacus Direct Corporation with its data collected anonymously about consumers on the Internet. In March of 2000, DoubleClick put the plan on hold. Bob Tedeschi, *In a Shift, DoubleClick Puts Off Its Plan for Wider Use of the Personal Data of Internet Consumers*, N.Y. TIMES, March 3, 2000, at C5.

The question of disclosure of Internet cookie files as public records is a clear example of technology outpacing the law. An overview of state public records laws indicates that current statutes, case law and attorneys general opinions leave courts ill-equipped to rule on such a matter. Also unresolved, as noted by Johnson, are access, storage and retrieval issues concerning transaction generated information. As Hunter noted, access laws were adopted with the assumptions that phone conversations were private and written communications were public;[120] such assumptions will need to be overhauled to deal with new communication forms such as cookies.

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[120] Hunter, *supra* note 50.

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# The malice muddle

## The changing definition of malice and its threat to the fair report privilege

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# The malice muddle

## The changing definition of malice and its threat to the fair report privilege

### Abstract

Suppose a mayor accused a councilmember at a town meeting of selling drugs. Next, suppose the reporter from the *Daily Banner* was told by his editor to forget about the accusation because the mayor's libel suit would bankrupt the paper. Wouldn't happen, you say?

Under new court interpretations of the fair report privilege, it might. The privilege protects reporters from libel suits if they cover official proceedings accurately, fairly, and without common law malice. However, some courts are applying the terms of actual malice, which could require reporters to investigate the likely truth of such accusations. This paper examines the resulting threat to the fair report privilege, a key media defense in libel suits.

*Larry Casteel, 48, had been accused of taking indecent liberties with a 15-year-old girl from the time she was 10. Wishing to avoid a trial, Casteel pleaded no contest to the felony. The Gillette (Wyo.) News-Record's story accurately reported the plea, but two sentences later said he "admitted" committing the acts. Casteel sued for libel because his "no contest" plea was not an admission of guilt. The Wyoming Supreme Court ruled for the newspaper. Its rationale: Although the story was wrong, it had "qualities of impartiality and honesty" and was free from "prejudice, favoritism, and self-interest."*[1]

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*Reporter Sandy Hodson's tip had produced a great story: The FBI searched the records of a local cap factory for evidence the owner's son-in-law had invested profits from his alleged drug trafficking. But when no such evidence was found, the owner unsuccessfully sued the Jackson (Tenn.) Sun for libel in federal court. The court's rationale: The search warrant's supporting affidavits, which Hodson had used in her story, were wrong, but she had fairly and accurately described them. The court went on: Even though the affidavits had the facts wrong, the reporter didn't know they were wrong, and she didn't exhibit "reckless disregard" for the truth.*[2]

• • •

*As the town council meeting was ending, one resident stood up to say the city had "problems with drugs, and it'd help if we could get Mr. Moreno to quit dealing drugs out of the back of his police car." The Crookston (Minn.) Daily Times printed the accusation against Gerardo Moreno, later cleared in a federal investigation. Moreno took his suit to the Minnesota Court of Appeals and won. Its rationale: The facts were wrong, and it didn't matter that the paper reported them accurately. The paper had reason to believe the facts were wrong, and it reported them maliciously.*[3]

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The cases have three things in common:

1) All three newspapers relied heavily on one of the most widely used defenses in media libel law: the fair report privilege.

2) None of the rulings was based on the truth of the facts in the stories.

3) Instead, the outcomes hinged on how the papers handled their understanding of that truth.

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[1] Casteel v. The News-Record Inc., 22 Media. L. Rep. (BNA) 2153 (Wyo. 1994).

[2] Billy Stem, d/b/a Crown Manufacturing v. Gannett Satellite Information Network, Inc., a/k/a Nashville Offset, d/b/a The Jackson Sun, 866 F. Supp. 355 (D.Tenn. 1994).

[3] Moreno v. Crookston Times Printing Co., 27 Media L. Rep. (BNA) 2180 (Minn. Ct. App. 1999).

The fair report privilege was fashioned through centuries of common law, as courts realized that citizens needed help to stay on top of public affairs. Once upon a time, people could attend every trial in their community, or read for themselves every public document or record that affected their lives. But as people's free time dwindled and the civic agenda grew more complex and crowded, the media began to perform a critical go-between role. The common law defense of fair report developed as courts tried to help the media fill that role: If public officials have an *absolute* right to say or write anything they want in their official capacity – even false and libelous statements – the press must be able to report those statements without fear of libel prosecution. Under the common law definition, that *conditional* fair report right is protected if the press meets three general and simple requirements: The report must be fair and balanced, substantially accurate and complete, and made without malice, which under common law means ill will, spite, or intent to cause harm.[4]

Because the fair report privilege is grounded in common law, its interpretation is up to individual states. Wyoming gave the privilege statutory standing with a very liberal interpretation: State law doesn't require that the story be true or accurate, just fair and impartial.[5] As long as the press can show it was fair – and the *News-Record* reporter filed an affidavit saying that his mistake in the Casteel story was "inadvertent and without malice" – the fair report privilege will stand. Tennessee courts have defined the state's common-law application more narrowly: Not only will an unfair and inaccurate report lose privilege, so will a report made with "actual malice," defined in *Sullivan v. New York Times* as publishing a story with knowledge that it is false or with reckless disregard for the truth.[6] Because no evidence was presented to show that the *Jackson Sun* reporter knew her report to be false, or that she acted recklessly, the privilege protected her newspaper.

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[4] 53 C.J.S. *Libel and Slander* §191 (1987.)

[5] Wyo. Stat. 1-29-105.

However, the Minnesota Court of Appeals combined elements of common law and actual malice in ruling against the 4,000-circulation *Crookston Daily Times.* Sgt. Detective Moreno lost in the trial court because the judge ruled that the *Times'* story was a fair and accurate report, and no showing of malice could defeat the privilege to print it. When an angry Moreno appealed, his lawyer Stephen Rathke explained why: "The judge's decision allows newspapers to print anything, even if they know it's false. I don't think that's the law in the state of Minnesota. I think a person's reputation is more important than the so-called right of a newspaper to publish false statements simply because they were stated at a public meeting."[7]

The state appellate court vigorously agreed, apparently blending the actual malice definition into its definition of common law malice: "The Restatement (Second) of Torts §611[8] (1977), providing that fair report privilege exists even though publisher does not believe defamatory words to be true or knows them to be false, does not represent Minnesota law; qualified privilege associated with common law fair reports privilege can be defeated under Minnesota law by showing common law malice."[9]

Reporters rely so heavily on the fair report privilege that the question of how that privilege can be defeated is a critical one. Often, the court faces a variety of decisions that will determine if the privilege holds:

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[6] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[7] Jaime DeLage, *Libel Case Against Crookston Paper Dismissed,* Grand Forks Herald Online (Oct. 13, 1998) <http://www.gfherald.com/news/docs/1013/1013times.htm>.

[8] The American Law Institute's widely consulted guide of legal interpretations. At §611, it says: "The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported." The section continues at paragraph *a* ". . . the privilege exists even though the publisher himself does not believe the defamatory words he reports to be true or even when he knows them to be false."

▸ Does the statement, meeting, or document qualify for protection as an official proceeding? For example, the *Cleveland Plain Dealer* was sued last year by AirTran Airlines after the newspaper reported potential safety problems found in a preliminary draft of an FAA safety inspection report. In September, the newspaper's motion for summary judgment based on the fair report privilege was denied, in part because the draft was "uncertified and unauthenticated."[10]

▸ Is the story fair? A *National Enquirer* story about a lawsuit filed against Larry Fortensky, Elizabeth Taylor's then-husband, was fair enough in its coverage of a court proceeding, even though it later quoted a fabricated neighbor to add "dramatic impact."[11]

▸ Is it accurate? For a Pennsylvania paper, printing that the plaintiff was convicted of embezzlement, when in fact he was convicted of tax evasion and mail fraud, was accurate enough.[12] In determining fairness and accuracy, courts have ruled that stories don't have to offer a full summary of the facts if the abridgement presents a complete picture, and they don't have to be absolutely accurate if the published accusation has the same "gist" and "sting" of the actual accusation.

The question of malice, however, is a much fuzzier issue. Traditionally, only common law malice would defeat the privilege, all other requirements being met. A review of case law found the *Crookston Daily Times* story to be an aberration: Most journalists don't go about their jobs with ill will in their hearts and intent to harm the people in their stories. However, if actual malice becomes an acceptable attack on the privilege, the ability to fully report on the absolutely privileged – and possibly libelous – comments of public officials will be in serious jeopardy.

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[9] Moreno v. Crookston Times Printing Co., 27 Media L. Rep. (BNA) 2180, 2180 (Minn. Ct. App. 1999).

[10] AirTran Airlines, Inc. v. Plain Dealer Publishing Co., No. 1:98-cv-1750-CAM, 1999 U.S. Dist. LEXIS 14134 (D. Ga. 1999).

[11] Fortensky v. National Enquirer Inc., 22 Media L. Rep. (BNA) 724 (Calif. Super. Ct. 1994).

[12] Reilly v. North Hills News Record, 27 Media L. Rep. (BNA) 729 (W. Pa. 1998).

## The meaning of malice

Mention libel to most journalists and lawyers and their touchstone usually is the landmark *Sullivan* ruling in 1964, which brought libel law within the protective perimeter of the Constitution. *Sullivan* created a distinction in libel law between public officials and private plaintiffs because the "uninhibited, robust" public debate expected by the First Amendment was likely to spark "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[13] The test of truth needed "breathing space" to hold its own in such an environment, so the Court in *Sullivan* and subsequent cases set up a two-tiered fault requirement.

Under *Sullivan* and its progeny, public officials and later public figures[14] had to prove the libel was committed with the fault level of actual malice. After *Gertz v. Welch*,[15] private plaintiffs also had to prove some level of fault, and the Court left it up to the states to decide what their standard of fault would be. Most states adopted a standard of simple negligence; a few have chosen the *Sullivan* actual malice standard; and at least one is using a "gross irresponsibility"[16] standard.

The term of actual malice is unfortunate because actual malice has nothing to do with the kind of malice that most people, including those who sit on juries, understand. Actual malice moves the question from the defendant's attitude toward the plaintiff – did he intend to hurt the plaintiff? – to the defendant's attitude toward the truth[17] – did the defendant behave recklessly with regard to the accuracy of his story?

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[13] New York Times Co. v. Sullivan, 376 U.S. at 270.

[14] Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967).

[15] 418 U.S. 323 (1974).

[16] New York, in Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569, 1 Media L. Rep. (BNA) 1693 (N.Y. 1975).

[17] Perez v. Scripps-Howard Broadcasting Co., 520 N.E.2d 198, 202 (Ohio 1988).

However, none of this applies when the fair report privilege is invoked. The fair report privilege applies whether the plaintiff is public or private, and traditionally, it didn't matter whether the publisher knew the story was false. Some states have enacted statutory provisions for the privilege, but in many states, the media still depend on common law for the privilege to fairly and accurately report from public proceedings and documents. Those states that have not passed fair report laws tend to rely on the guidance of the Restatement (Second) of Torts from the American Law Institute. Under the fair report privilege, the question becomes not one of truth or falsity but of accuracy and fairness.

### A balancing act

The battle between defending one's reputation and defending the fair report privilege is as old as common law itself, but the value of a good name goes back centuries. Under Roman law abusive chants could be punished by the death penalty. In the seventeenth and eighteenth centuries, a person's investment in his reputation outweighed society's need for free speech[18] under common law. The concept of privilege existed only as a measurement to determine punishment, weighing the intent of the speaker against the falsity of his statement. The standard of the time was "actual malice," which, unlike the term's use in *Sullivan*, was defined as any "mean or crooked motive of which an honourable man would be ashamed."[19] The motive for making the statement was key to passing judgment: Was there a good reason, a possible excuse, for the slanderous statement?

> A typical case is Peacock v. Reynal, where a nephew-in-law wrote his uncle-in-law that the uncle's son was illegitimate, haunted taverns, and desired his father's death. The Star Chamber held that if the defamer's motive had been to help the father reform his son, there would have been no libel, but since it had been to gain the son's inheritance, it was malicious. In another early case, the plaintiff sued the defendant for falsely and maliciously "saying of him, that he heard he was hanged for stealing

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[18] W. Page Keeton, *Prosser and Keeton on the Law of Torts*, §112, at 795 and §113, at 804 (1984).

[19] *See* William B. Odgers, *The Law of Libel and Slander* 204 (2d Eng. ed. 1887).

> of an horse." The plaintiff was nonsuited because the words were spoken "in grief and sorrow for the news" rather than maliciously.[20]

It wasn't until the nineteenth century, however, that case law began to carve out a separate defense status for a communication privilege, and one of the earliest was that of mutual interest: The speaker says something the hearer needs to know to protect a mutual interest. In *Toogood v. Spyring*,[21] a tenant farmer was sued when he told the land's owner that a workman, sent to the farm by the owner to make repairs, had instead gotten drunk and bungled the job. Baron Parke, in ruling for the tenant, said privilege existed for the good of society. A statement is privileged, he said, if it is

> fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defense depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society.[22]

Since Parke's ruling, the scope of both malice and privilege broadened. Actual malice gave way to presumed malice – instead of the presence of malice being a question of fact to be determined, all false statements were presumed to have been made with malice – and the concept of privilege expanded beyond the immediate speaker and listener to include a third party who needed to hear the information.[23] One of the earliest expressions of support for such privilege in American courts was made by Justice Holmes, who endorsed its "supervisory" function in *Cowley v. Pulsifer*:

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[20] M.M. Slaughter, *The Development of Common Law Defamation Privileges: From Communitarian Society to Market Society*, 14 Cardoza L. Rev. 351, 367 (1992).

[21] Toogood v. Spyring, 149 Eng. Rep. 1044 (Ex. 1834).

[22] *Id.* at 1049-50.

[23] *See* Davies v. Snead, 5 L.R.-Q.B. 608, 611 (1870): "[W]here a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, ... it is a privileged communication."

> It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.[24]

The law we live with today, however, was profoundly shaped by two relatively recent cases. The legal definition of malice abruptly changed with *Sullivan* in 1964, and the policy underpinning of privilege was given a broad base in *Medico v. Time, Inc.*[25] in 1981. *Time* magazine published an article that used information from FBI records to link then-Congressman Daniel Flood with reported Mafia insiders Russell Bufalino and Philip Medico. The FBI was investigating accusations that the Pennsylvania congressman was using his influence to steer government contracts to the Medico construction business. In protecting *Time's* use of the material, the United States Court of Appeals for the Third Circuit laid out three rationales for the fair report privilege:

- The "agency" rationale: A reporter, acting as an agent for the public, is covering activities to which the public is invited but unable to attend.
- The "public supervision" rationale: The media keep the government open and accountable.
- The "public's right to know" rationale: The public has a justifiable interest in matters of public importance.

It is on the third point that the fair report privilege draws some of its sharpest criticism. The right to privacy has been dealt a devastating blow by encroaching media requests for public records, some critics argue. One commentary uses *Cox Broadcasting Corp. v. Cohn*[26] to argue for the right to keep some public records private. In *Cox,* which gave First Amendment protection for information disclosed in court proceedings, the Court ruled that Cox's broadcasting of a rape victim's name obtained from an indictment was protected. Author Karen Rhodes argues:

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[24] Cowley v. Pulsifer, 137 Mass. 392, 394 (1884).

[25] 643 F.2d 134 (3d Cir.), *cert denied*, 454 U.S. 836 (1981).

> First, publication of material derived from court records often does little to advance the public's interest in understanding and "supervising" the conduct of public affairs. … Second, even if one accepts the premise that publication of material disclosed in court proceedings advances the public's supervisory interests, it is not clear that the First Amendment requires absolute protection for courtroom coverage to vindicate those interests. … By constitutionally protecting all publications of matters of public record rather than simply those publications truly advancing public-supervisory interests, the *Cox Broadcasting* mandate serves only to protect those who publish matters of public record lacking any nexus to the supervision of government affairs.[27]

Besides, Rhodes continues, why should public-record information deserve more protection than information from other sources? In fact, she suggests, non-public-record information is in greater need of public supervision because that is where secrets are likely to be hidden. She also questions whether the public has an unrivaled interest in public affairs. Citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* [28] – which suggests that a consumer's interest in commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate" – Rhodes argues that if the "established hierarchy of First Amendment values is indeed unjustified, so too are the unique protections afforded publications of matters of public record on the grounds that they advance public-supervisory interests." [29]

The media also have been chided for their attempt to push the fair report privilege beyond official actions and proceedings to unofficial actions. For example, David Elder, law professor at

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[26] 420 U.S. 469 (1975).

[27] Karen Rhodes, *Open Court Proceedings and Privacy Law: Re-Examining the Bases for the Privilege*, 74 Tex. L. Rev. 881 (1996).

[28] 425 U.S. 748 (1976).

[29] Rhodes, *supra* note 27.

Northern Kentucky University, rejects a suggestion that the press was acting within its rights when it identified Richard Jewell as a suspect in the Olympic Park bombing. Elder asserts that the media too often try to equate "truth" with accurately reporting what "police say":

> Media apologists invariably try to bootstrap such unauthorized government leaks into protected fair-report status by breast-beating incantations of their "watchdog" role over government. This attempted justification is perverse. Law enforcement officers and criminal justice officials share a common duty: to protect the citizenry from unfounded charges or allegations by filtering out speculative or unsubstantiated allegations of crime from bona fide, substantiated charges warranting prosecution.[30]

Clearly, the fair report-reputation relationship balances on a fine point: An unabridged defense of reputation drains the fair report privilege of its power to help citizens become partners in the public process. If greater weight is given to the goals of an involved citizenry, the ability to defend one's reputation suffers. The relationship is not unlike a playground seesaw: When one side rises, the other falls. The challenge is to find a steady middle point, where justice flows evenly to both sides.

### Newsrooms at risk

In one of the most elegant expressions of the value of reputation, Justice Potter Stewart wrote, "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty."[31]

As the judicial system works to protect that right, however, the range of speech that falls within the purview of the courts can determine how a reporter does his job, and how an editor guides her newspaper. If speech about matters of public concern is narrowly defined, warns Stephen

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[30] David Elder, *Law Doesn't Protect Media Irresponsibility*, Nat'l L. J., Jan. 20, 1997, at 16.

[31] Rosenblatt v. Baer, 383 U.S. 75, 92 (1966).

M. Stern, "courts of law will replace editorial boardrooms; if defined broadly, newsgathering will become the defense nouvelle for all violations of general laws."[32]

The role of malice – common and actual – in the standing of the fair report privilege is unclear, yet it poses a potentially devastating threat. Ruth Walden, a professor at the University of North Carolina at Chapel Hill, poses the following scenario:

> For example, if a state legislator speaking on the floor of the General Assembly made defamatory allegations against the governor, a journalist might feel those charges should be reported in the press, even if the journalist seriously doubted their truth or even knew they were false. The journalist might reason that the public needed to know that a legislator was making unsubstantiated and irresponsible charges against the governor. Since the basic purpose of the fair report privilege is to enable the media to inform the public about the actions of government officials and operations of government, whether the journalist knew or suspected that the statements made by the legislator were false would seem irrelevant.[33]

The American Law Institute, created more than seven decades ago after a task force found that uncertainty and complexity in the law had produced "general dissatisfaction with the administration of justice,"[34] has tried to discourage states from using either common law or actual malice to defeat the privilege. Its post-*Sullivan* Restatement (Second) of Torts abandons the stance of the 1938 Restatement (First) of Torts that a corrupt motive defeated the privilege. To many, motive had become irrelevant in *Sullivan's* wake. The presence of ill will does not necessarily negate the value of a speaker's comments, as the Supreme Court said in *Garrison v. Louisiana*:

> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.[35]

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[32] Stephen M. Stern, *Witch Hunt or Protected Speech: Striking a First Amendment Balance Between Newsgathering and General Laws*, 37 Washburn L.J. 115 (1997).

[33] Ruth Walden, *Mass Communication Law in North Carolina* 26-27 (1993).

[34] *About the American Law Institute* Web page (visited Oct. 15, 1999) <http://www.ali.org/ali/thisali.htm>.

[35] Garrison v. Louisiana, 379 U.S. 64, 73 (1964).

That line of thinking convinces some authorities that the fair report privilege is, in essence, an absolute privilege. As Bruce W. Sanford writes:

> This result is sensible. If constitutional "actual malice" were sufficient to defeat the privilege, the policies behind the privilege would, for all practical purposes, be eviscerated. The basic aim of the privilege is to encourage accurate and fair reporting of statements made during public proceedings. The editor's belief in the truth or falsity of such statements should not matter; the point is that the statements were made. The fairness and accuracy requirements afford ample protection to reputational interests once an individual has become embroiled in public proceedings.[36]

Sanford writes encouragingly of the paucity of reported cases in which common law malice defeated the privilege; in fact, he cites the Restatement (Second) of Torts' assertion that there have been no cases,[37] although that was written before this summer's appellate setback for the *Crookston Daily Times*. The newspaper's appeal has been accepted by the Minnesota Supreme Court, but at least one major newspaper company has already voiced concern. Barbara Wartelle Wall, who writes a legal news summary for the Gannett Co.'s member papers, notes that if the appellate decision stands, "the fair report privilege will be narrower in Minnesota than in many jurisdictions."[38]

The legal status in other states is murky. Sanford suggests that the ruling in *Schiavone v. Time, Inc.* supports the viewpoint that malice cannot be a weapon against the fair report privilege.[39] However, as the *Crookston Daily Times* found out, not all states share that view.

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[36] Bruce W. Sanford, *Libel and Privacy* 490 (1999).

[37] *Id.* at 489.

[38] Barbara Wartelle Wall, *Minnesota Appeals Court Narrows Fair-Report Privilege*, Legal Watch, Gannett Co. Web site (visited Oct. 23, 1999) < http://www.gannett.com/go/newswatch/99/july/nw0702-6.htm>.

[39] Sanford, *supra* note 36, at 489. The ruling in *Schiavone v. Time, Inc.*, 569 F. Supp. 614, 619 (D.N.J. 1983), according to Sanford, holds that the fair report privilege is *not* defeated by proof of defendant's ill motives or 'malice in fact.'"

## Method and research questions

A clearer picture of how courts are addressing the malice issue is essential to understanding what risk it presents to the newsgathering process. This paper surveyed 140 distinct cases in the 1990s that involved the fair report defense: 106 cases were culled from the indexes of Media Law Reporter, 21 cases were found in the West Decennial Digest, and 13 found through a LEXIS search using the key words "libel," "fair report," and "malice." The cases came from trial courts as well as appellate courts. Many more cases might be found in those sources under a search for "privilege," but only those cases where the court was unambiguous in its discussion of the fair report privilege, as opposed to another privilege such as communication of mutual interest, were included. The 50-state Media Libel Law Survey from the Libel Defense Research Center was also used to collect data.

The opinions were analyzed to consider these questions:

- In what percentage of the cases is the issue of either kind of malice discussed, either in the summary or the full opinion, in regard to the fair report privilege? Often, the determination of whether the privilege had been abused did not pivot on the issue of malice; many decisions were based on other points of law, such as fairness, accuracy, and whether the material qualified for the privilege. However, the fact that courts felt obliged to even raise the question of malice indicates it is still a factor for many of them.

- In how many cases did the court expressly state that common law malice could defeat the fair report privilege, all other conditions being met? Did any plaintiff, beside officer Moreno, prove such malice?

- In how many cases did the court expressly state that actual malice was the standard necessary to defeat the fair report privilege? Did any plaintiff manage to meet that standard and on what evidence?

- What arguments were used in the opinions to support or deny charges of either type of malice?

## A portrait of malice

Judges frequently say in libel opinions that they must view the story as a whole and not consider any of its statements in isolation. As one opinion put it, "A magnifying glass is no aid to appreciating a Seurat, and the pattern of a complex structure is often discernable only at some distance."[40] Thus, the survey of cases offers a canvas of disturbing opinions, but trying to determine a provable trend is akin to using the art critic's magnifying glass. The cases offer glimpses, but perhaps not the full picture.

Those glimpses, however, show that the traditional common-law definition of malice as ill will is getting a lot of company from actual malice, the relatively new kid on the block in fair report cases. Of the 140 surveyed cases, 32 (or 23 percent) mentioned a malice standard. Of those 32 cases, 18 set a common law standard of fault, and 14 required a showing of actual malice. Although three of the actual malice cases were in Georgia, the rest were spread across the country: the District of Columbia, Florida, Louisiana, Maryland, Minnesota, New Jersey, Pennsylvania, Tennessee, South Dakota, and Texas. In Georgia, Maryland, Pennsylvania, and New Jersey, different courts used different standards of fault.

To compound the confusion, a few cases mentioned both ill will and actual malice in the same discussion of the fair report privilege. Clearly some judges are as confused as juries about the distinction, and in some cases, they can blame their own state law.

Consider the case of Dr. David Brown and nurse Shelley Russell, who were disciplined by the Utah State Division of Licensing because he provided her drugs and medical treatment. Eight months after Russell submitted to a drug-testing program and a month after Brown agreed to a six-month suspension, the *Daily Spectrum* in Cedar City, Utah, published a story with the details of the case, obtained from the director of the licensing division: Brown overprescribed narcotics to Russell and did medical procedures that were "ethical no-no's." When asked what the procedure was, the director replied, "It's for abortion." The director also told the reporter that Brown and Russell were rumored to be romantically involved and that doctors and nurses often "trade drugs for sex."

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[40] Chapin v. Knight-Ridder Inc., 21 Media L. Rep. (BNA) 1449, 1456 (4th Cir., 1993).

After the Spectrum's story appeared, Russell sued for libel,[41] and her case eventually reached the Utah Supreme Court. In its discussion of the paper's fair report defense, the court said that Utah's statute required the plaintiff to show "actual malice" to defeat the privilege. In its subsequent description of what qualifies a statement for the privilege, the opinion said "it must be made without 'malice.'" A look at Utah's statute explains why the opinion used both wordings:

> The degree of malice that must be proven to overcome successfully the statutory privilege set forth in Subsection (4) is the common law standard from which the statute was derived. This standard creates, in effect, an absolute privilege for a defendant's statements unless the statements were made with ill will, were excessively published, or the defendant did not reasonably believe his or her statements were true.[42]

When the statute defines common-law malice as both "ill will" and doubt about the story's veracity, it's no wonder an opinion would use both wordings. The court resolved the case by sending it back for a jury decision on whether the licensing director made the abortion statement, a quote that he denied making. If jury decided he did, the fair report privilege would hold.

Some actual malice determinations appear to rest on very soft precedent. James Sedore and Paul Reynolds sued the *Bernardsville* (N.J.) *News* after it listed them as the owners of an Audi dealership that closed after employee paychecks began to bounce.[43] The trial court denied the paper's request for summary judgment based on the fair report defense because it mistakenly said the paper had failed to produce evidence on the plaintiff's public or private figure status. If the fair report privilege is invoked, the status of the plaintiff becomes irrelevant, as the appellate court pointed out:

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[41] Russell v. Thomson Newspapers, d/b/a The Daily Spectrum and Messerly, 842 P.2d 896 (Utah 1992).

[42] Utah Code Ann. § 45-2-3 (4).

[43] Sedore and Reynolds v. The Recorder Publishing Co., 716 A.2d 1196 (N.J. Super. 1998).

> In so ruling, the trial judge ... misapplied prevailing requirements and misconceived the nature of the case. ... It was clearly erroneous for the trial court to have based its ruling on the need to make that determination. Defendants have premised their positions upon arguably applicable qualified or conditional common law privileges, rather than on the federal/state constitutional privilege.[44]

The appellate opinion went on to describe the deficiencies of the word "malice," quoting liberally from a 1986 state supreme court case, and concluded by dismissing the libel complaint. The state supreme court case was, in fact, generous in its dislike for "malice" as a legal description:

> The term "malice" caused enough confusion when it was confined to the common law, but now it that has assumed a constitutional dimension, the confusion is compounded. Understandably, the differing definitions of "malice" have confounded trial courts.
>
> "Malice" adds nothing to the legal analysis of an allegedly defamatory statement, and it can become a pitfall in the underbrush of the common law. Consequently, we lose nothing by striking "malice" from the vocabulary of the common law of defamation ... Indeed, the Restatement eschews the term altogether, speaking instead of the "abuse of privilege." It is more direct to recognize the legal consequences of the publication of certain statements without recourse to so ambiguous a word with such a checkered past. For example, we need not resort to the term "malice" to state that no one has a license to lie.[45]

That's a clear-cut answer to the question of what defeats the fair report privilege. The only problem, however, is that "fair report" is never discussed in the decision. The opinion refers consistently to the "fair comment" privilege, which protects nonmalicious statements of opinion about matters of public interest. Perhaps the court intended its comments to apply to both the fair comment and fair report defenses. Perhaps not.

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[44] *Id.* 1998 N.J. Super. LEXIS 395, at section III.

[45] Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. 125, 150 (N.J. 1986).

A final area in which the actual malice standard has been applied are cases where the newspaper "plainly adopts" the malicious statement as its own through lack of proper attribution. This survey uncovered two such cases, but in both situations, the reporters protected themselves when they accurately attributed the quotes.[46]

In addition to legal confusion, the survey found language in some dissenting opinions that reveals judicial disgruntlement with the level of "privilege" the press enjoys. In August, the Nevada Supreme Court ruled that members of the general public enjoy an "absolute" privilege to republish statements from official proceedings that they know to be false.[47] However, two judges wrote a blistering dissent, saying the court majority had fashioned the fair report "shield" into a "sword" to be used as a weapon:

> ... I find the premise upon which the fair report privilege is based – that all court documents are factually reliable – to be questionable in today's society. We have seen lawsuits with extravagant claims filed for political or strategic purposes, and I would not guarantee the veracity of some of the allegations I have seen or read about in various pleadings. But aside from the dubious premise upon which the fair report privilege is based, I believe that the absolute privilege the majority espouses today may lend itself too much mischief. ... The First Amendment does not and should not be contorted to protect malicious liars merely because the lies were contained within the context of a judicial action.[48]

The encouraging news from this survey is that with the exception of *Moreno v. Crookston Daily Times*, malice by either definition never defeated the privilege. And still more encouraging news arrived after the survey was concluded: In May 2000, the Minnesota Supreme Court rejected the use of common-law malice as a weapon against the fair report privilege.[49] The court agreed that motive was irrelevant to the privilege's public-policy goal of disseminating information, and it sent the case back to the trial court to determine whether statements in the *Crookston Daily Times'* story that were made outside the protected confines of the city council meeting were defamatory.

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[46] Chapin v. Knight-Ridder Inc., 21 Media L. Rep. (BNA) 1449 (4th Cir. 1993); Boyd v. University of Maryland Medical System, 26 Media L. Rep. (BNA) 1401 (D. Md. 1998).

[47] Sahara Gaming Corporation v. Culinary Workers Union Local, 984 P.2d 164 (Nev. 1999).

[48] *Id.* at 170 (Rose, C.J., concurring).

Most bids by plaintiffs to establish common law malice rested on the manner in which the newspaper or television station edited its report: Were both sides fully represented? Did the language skew the reader to one opinion or the other? In essence, did the existence of common law malice produce an unfair story, which would fail one of the basic requirements of the fair report privilege?

For example, a Pennsylvania bank sued over a newspaper story that it said failed to fairly reflect the facts of a complaint filed against it.[50] The bank said the newspaper intended to harm it by using the word "tricked" in the headline and "euchred" and "cozy" in the story, which the court found to be an acceptable "smart alecky" style of writing. The bank also accused the newspaper of not making it clear that the allegations against it were as yet unproven, but the court pointed out the repeated use of words like "claim," "charges," and "contends." Finally, the bank offered these arguments as proof of intent to cause it harm: The paper had run a series of critical articles about the bank three years before; the reporter didn't contact anyone at the bank for comment on the complaint; and another reporter testified that he would have talked to the bank had he written the story but that he wouldn't have chosen to write the story in the first place.

The court's response? "We are unpersuaded," reads the opinion. The newspaper was under no requirement to contact the bank, it continued, and the other reporter's opinions and the previous articles were "without merit." The absence of common law malice was "so clear that reasonable minds cannot differ."[51]

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[49] Gerardo Moreno vs. Crookston Times Printing Co., C6-98-2421 <http://www.state.mn.us/courts/library/archive/supct/0005/c6982421.htm> (Minn. 2000).

[50] First Leigh Bank v. Cowen, 24 Media L. Rep. (BNA) 2409 (Pa. C.P. 1996).

In *Crookston,* the only case in which a court upheld the plaintiff's accusation of common law malice, the Minnesota appellate court offered no specific reasons for its decision. The opinion was focused entirely on why common law malice, which it described with elements of both ill will and knowledge of falsity, should defeat the privilege, not how the *Crookston Daily Times* story displayed that malice.[52]

Attempts by plaintiffs to establish actual malice focused on arguments that had the reporter done a little more checking, he would have found the allegations to be false. Sheriff's deputies in Broward County, Fla., sued a local television station when it aired reports that they had been disciplined for using excessive force.[53] The court, in finding the station had accurately reported information in press releases from the sheriff's press information office, said the station had no further obligation to determine the accuracy of the information.

## Conclusion

The fact that malice by any definition never defeated the fair report privilege is not to say the privilege is a sure thing. Courts denied the privilege in 23 percent of the cases in this survey for reasons besides malice; for example, the courts often ruled that the stories did not report privileged statements or that the stories were not substantially accurate or fair.

However, for a privilege that is so essential to full and frank coverage of our designated representatives, the specter of an actual malice weapon is disturbing. The threat is real, despite the courtroom success stories: Malice was an issue in roughly one-fourth of the survey's cases, and in almost half of those cases, the court applied a standard of actual malice. What is a reporter to do if the mayor accuses a local businessman of making violent threats? If a local businessman calls the mayor a slut and an extortionist at a public meeting, should the newspaper remain mum? And if the police chief accuses the mayor of selling drugs, do reporters avoid the story, fearing the legal wrath of both the police chief and the mayor?

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[51] *Id.* at 2416.

[52] Moreno v. Crookston Times Printing Co., 27 Media L. Rep. (BNA) 2180 (Minn. Ct. App. 1999).

[53] Stewart v. The Sun Sentinal Co., 24 Media L. Rep. (BNA) 1318 (Fla. Cir. Ct. 1995).

A growing body of opinion is making a case for eliminating malice altogether from the fair report equation. As Sanford suggests, what matters to an informed citizenry is that the information contained in public proceedings is conveyed to them, not the motive with which it is conveyed. Complicating the question, however, is the relevance of malice to fairness. For a reporter to be fair, he must have an accurate understanding of the story's meaning. If his understanding is clouded by ill will and spite, how reliably can he trust his fairness?

The courts have offered little guidance in their opinions. For example, in the *Crookston* case, the appellate court offered no explanation for its finding that the paper acted with malice. Was malice evident in the reporting of the story? The presentation of the story? The conduct of the reporter or editor? Editors and attorneys who hope to find the answer in the court's opinion will come away empty-handed. Furthermore, the often-muddy language in many court opinions indicates that courts themselves may be in need of guidance. Such guidance could come from giving the fair report privilege statutory standing, as 16 states have done, but Georgia's law suggests that unless the law is written with crystal clarity, doubt can remain. The Georgia statute opens with a flat statement that "fair and honest" reports of legislative or judicial bodies are privileged.[54] However, a few short paragraphs later, confusion creeps in:

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> In every case of privileged communications, if the privilege is used merely as a cloak for venting private malice and not bona fide in promotion of the object for which the privilege is granted, the party defamed shall have a right of action.[55]

"Venting private malice" has all the earmarks of someone acting with the ill will and spite found in common-law malice. What, then, are journalists to conclude? What protection do they have to fully report the public's business when that business contains libelous statements? The coverage of lawsuits alone becomes a minefield of potential litigation for journalists.

Given a long history of negative reader surveys and comments like those of the dissenting Nevada justices, editors, their attorneys, and state press associations would be wise to carefully consider the situation in their state and, where necessary, lobby for clear and absolute protection for the fair report privilege. Anything less compromises the media's ability to report the public's business and risks the free flow of information vital to an informed democracy.

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[54] Ga. Stat. 51-5-7: "The following communications are deemed privileged: ... (5) Fair and honest reports of the proceedings of legislative or judicial bodies; (6) Fair and honest reports of court proceedings; (8) Truthful reports of information received from any arresting officer or police authorities; ..."

[55] Ga. Stat. 51-5-9: "In every case of privileged communications, if the privilege is used merely as a cloak for venting private malice and not bona fide in promotion of the object for which the privilege is granted, the party defamed shall have a right of action."

# Tainted Sources, Matters of Public Concern: Applying the Wiretapping Laws To Media Disclosures

A paper submitted to the AEJMC Law Division

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# Tainted Sources, Matters of Public Concern: Applying the Wiretapping Laws to Media Disclosures

## Introduction

With cellular phones seemingly in every pocket, purse, briefcase and backpack and the myriad conversations they generate floating though the airwaves, it has never been easier for electronic eavesdroppers to listen in on others. In many situations, all the curious need is a radio scanner.[1] The ease of access provided by technology has not, of course, made the eavesdropping legal. Under both federal wiretapping laws and similar state statutes, intercepting cellular phone conversations is illegal.[2] For the actual eavesdroppers, a common outcome is a guilty plea to criminal charges.[3]

But other provisions of wiretapping laws are not so easily applied. In addition to prohibiting interception, many wiretapping statutes provide penalties for disclosing information that the recipient knows or reasonably believes to be the product of electronic eavesdropping. The federal wiretapping law, for example, includes civil liability provisions that may apply to anyone who "intentionally discloses or endeavors to disclose, to any person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral or electronic communication in violation of this subsection."[4] Most states have similar laws.[5] The problem with the disclosure penalties in these statutes is determining how or whether they can survive First Amendment challenge.

particularly by media that have disclosed truthful, newsworthy information provided to them by sources.

In two recent cases, Boehner v. McDermott 191 F.3d 463 (D.C. Cir. 1999) and Bartnicki v. Vopper 200 F.3d 109 (3rd Cr. (Pa.) 1999), challenges to the disclosure provisions have left U.S. Circuit Court of Appeals panels severely divided. The questions presented by these cases will now go to the U.S. Supreme Court, which on June 26 agreed to hear the Bartnicki case.[6] In Bartnicki, the Third Circuit found the disclosure provisions of the wiretapping statutes unconstitutional when "applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception."[7] In Boehner, the D.C. Circuit had upheld the provisions, at least as applied to an intermediary who transferred information to media. [8]

The Supreme Court's decision to take the Bartnicki case is not surprising, given the fractures at the Court of Appeals level. Not only were the Circuits themselves divided, but in deciding the two cases, both appellate courts also reversed lower court decisions. Neither appellate panel was unanimous in its decision. In fact, in the D.C. Circuit, the panel majority agreed on outcome but split on analysis at some points.

These decisions confirm that privacy law is a tangle. They also indicate that the constitutional standard for judging truthful, newsworthy disclosures is up for grabs. And, further, since lower courts have also been divided,[9] they reveal a virtual black hole in analysis when courts are faced with cases in which media have dealt with tainted sources -- that is, sources who offer information that is true and newsworthy but of questionable origin.

This paper reviews the precedents in this area and the recent analyses of the wiretapping statutes in Boehner and Bartnicki, focusing on application to media. The paper then proposes that viewing privacy law as an aspect of community would be helpful as the Supreme Court sorts through the conflicting interests presented in these cases. Finally, the paper suggests that the changing nature of news may point toward a bright-line rule, including a "safe harbor" provision for certain types of disclosures.

## The Expected Line of Analysis

Before describing the recent cases, it is useful to review the line of cases that many thought would apply as precedent to analysis of the wiretapping statutes.[10] These cases, which the U.S. Supreme Court began considering in the 1970s, focused on statutes that sought to penalize disclosures of particular types of information.

The first of the cases, Cox Broadcasting Corp. v. Cohn,[11] involved a Georgia statute that prohibited disclosing the name of a rape victim. The statute provided the foundation for a lawsuit brought a father whose daughter had been raped and murdered. In the lawsuit the father argued that Cox Broadcasting had invaded his privacy when it revealed that his daughter had been raped. (492) A reporter for Cox had copied the name from court documents provided during a recess in the prosecution of the case against the victim's attackers. (496)

The Supreme Court acknowledged the significance of privacy interests, but concluded that the First Amendment barred liability when the information sought to be kept private had been made available in open court records. In what would be a pattern for similar cases, the Court emphasized the narrowness of its holding, specifically refusing to recognize blanket protection for publication of truthful information of public concern. (491) The court noted that even Warren and Brandeis,[12] who proposed the privacy tort, recognized a privilege to report judicial proceedings. "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby served," the Court said.[13]

In the next case, Landmark Communications, Inc. v. Virginia,[14] the Court considered a Virginia statute that provided criminal sanctions for disclosures about pending proceedings before the state's judicial disciplinary body. Landmark Communications, owner of the Virginia Pilot, was convicted under the statute after the newspaper accurately reported on confidential proceedings, based apparently on information "leaked" to it.

The Court framed the question presented as whether the First Amendment would allow criminal sanctions against third parties -- strangers to the disciplinary proceeding -- for disclosing truthful information about the proceeding. (837) As in Cox, the Court refused to address a broader issue -- whether sanctions are ever appropriate when media report accurately about public officials in connection with their public positions.

The Court concluded that the Virginia statute was incompatible with the First Amendment. Its reasoning, however, seemed little concerned with privacy itself. Instead, it focused more on whether the law was needed to assure confidence in the judicial system and effectiveness in the disciplinary process. The Court concluded that those interests were insufficient to justify the disclosure penalties. (841-842) The Court went on to address the "clear and present danger" test that had been applied at the state level. The Court questioned "the relevance of the standard," but then outlined a different understanding of what would be clearly dangerous. It found that the test could be satisfied only in "extreme circumstances," not present in this case. (843-844)

It took a third case, Smith v. Daily Mail Publishing Co.,[15] to put the reasoning of Cox and Landmark together. In Smith, the Supreme Court found that the First Amendment barred West Virginia from making it a crime for a newspaper to publish the names of juvenile offenders without first seeking judicial permission. At issue were stories in the Charleston Daily Mail and the Charleston Gazette, which identified by name a 14-year-old suspect in a school shooting. The papers had learned the identity of the suspect from witnesses at the scene of the shooting, including the police and assistant prosecuting attorney. (98)

As the Court considered the newspaper reports in Smith, it described its recent decisions as establishing that "state actions to punish the publication of truthful information seldom can satisfy constitutional standards." (102) But, again, privacy itself did not appear to be a central concern. Instead, the question was the state's interest in protecting the identity of juvenile offenders. (104) That interest, the Court pointed out, already had been found less significant than another constitutional protection -- a criminal defendant's right of confrontation.[16] The Court also saw little chance that the West Virginia statute would work as intended since the law was aimed at print media, but not broadcast.[17]

The Court found that the state's interest did not justify the sanction that the statute imposed. Again, the Court ended on a narrowing note: "There is no issue before us of unlawful press access to confidential judicial proceedings...." (105)

A decade later the Court took up similar issues in Florida Star v. B.J.F.,[18] in which it considered a Florida statute penalizing the publication of the name of a sexual assault victim by means of mass communication. The statute had been the basis for a lawsuit against the Florida Star, which printed the name of a rape victim its reporter had copied from a police report made available in the pressroom of the Duval County Sheriff's Department. (572)

In Florida Star the privacy interests were clearly established. At trial, B.J.F. had testified about the effects of the Florida Star's naming her as a rape victim. (528) She said that she was distressed when she had learned about the article from co-workers and acquaintances and that her mother had received phone calls from a man who threatened to rape B.J.F. again. She also testified that she had been forced to change her phone number and address, to seek police protection and to undergo counseling.

Despite these interests, the Court upheld the right to publish, citing a principle identified in Daily Mail: " [I]f a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication, absent a need to further a state interest of the highest order." (533)

The Court conducted an inquiry based on that principle. (536-537) First, was the information accurate? Next, was the information lawfully obtained? Then, was the information of public significance? Finally, was the state's interest of the "highest order"?

After quickly concluding that the Florida Star's report had been accurate, the Court turned to the "lawfully obtained" question. Even though the statute barring disclosure had been posted in the sheriff's press area, the Court concluded that the newspaper had obtained B.J.F.'s name lawfully. The Court directed its attention toward the role of the state. States wishing to prevent disclosure of victims' names have means besides penalizing media, the Court suggested, particularly when the government itself holds the information. (534) In addition, media should be able to rely on information provided by government without having to second-guess their ability to publish that information, the Court said. (535 - 538) The Court also concluded that a report about a crime was a matter of public significance. In doing so, however, it suggested that the name of the victim might not be. (536-537)

Then, the Court turned to the nature of the state's interest. It saw that interest as protecting victims' privacy and safety and encouraging others to report crimes. It suggested that in some instances those interests would justify a limitation on disclosure, but it found that this statute was not properly drafted.

The Court criticized the statute's failure to consider, as tort privacy law does, whether the disclosure was a highly offensive disclosure of private information. (539) It also rejected the strict liability rule. Finally, the Court expressed doubts about the effectiveness of the statute since the law prohibited disclosure by mass media, but not others. (540) Once again, the Court confined its ruling to the facts of the case. It had noted earlier that the Smith rule did not determine whether a state could punish publication of information that had been unlawfully acquired by either source or publisher. (535, fn. 8)

The Court described Florida Star as an opportunity to explore the "tension between the right which the First Amendment accords a free press, on the one hand, and the protections which various statutes and common-law doctrines accord to personal privacy against the publication of truthful information, on the other... ." (530) Since the disclosure provisions of the wiretapping laws raise precisely those concerns, it seemed logical that Florida Star would apply. The two recent wiretapping cases, however, raise doubts about that expectation.

## The Recent Cases

### In the District of Columbia Circuit

The first of the recent cases to be decided was Boehner v. McDermott, a legal legacy of the high profile incident in which eavesdroppers intercepted Republican Rep. John Boehner's cellular phone conversation about ethical problems involving then-Speaker Newt Gingrich. Even though June's granting of petition for writ certiorari came in Bartnicki, it is useful to consider Boehner first because the analysis in Bartnicki was, in part, a reflection of this earlier opinion.

According to the allegations of the complaint in Boehner, a tape of the intercepted conversation about Gingrich was provided to Rep. James McDermott, then the ranking Democrat on the House Ethics Committee.[19] McDermott was not involved in the actual eavesdropping, but he apparently accepted the tape, knowing its source. After the conversation was reported in the New York Times and other media, Boehner sued McDermott, alleging that McDermott had violated the disclosure provisions of the wiretapping laws[20] by providing copies of the tape to media. McDermott sought dismissal of the lawsuit on grounds that the First Amendment protected his disclosure.

In seeking dismissal, McDermott relied on the rule in Florida Star that the government may not penalize the disclosure of lawfully acquired, truthful information of public concern, absent a state interest of the highest order.[21] The District Court found Florida Star controlling and dismissed. The District Court reasoned that since the wiretapping statutes did not penalize the receiving of information, McDermott's acquisition of the tapes could not be characterized as clearly "unlawful." The court suggested, however, that McDermott's actions undermined the protection against eavesdropping and that McDermott had "exploited the loopholes" in the law. [22] Thus, while the court agreed that Florida Star applied, it was unhappy with the result.

On appeal of the dismissal, the District of Columbia Circuit reversed, with a majority of the panel finding the wiretapping laws' sanctions on disclosure to be constitutional, at least as applied to an intermediary who accepted a tape and then provided it to the media.[23] The judges who agreed on that outcome were divided, however, on the proper analysis.

Judge Randolph, writing the opinion of the court, rejected McDermott's argument that his disclosure was speech protected under Florida Star. Instead, he asked: "What speech?" (466) He characterized McDermott's activities as primarily behavior or conduct, and concluded that the rule in United States v. O'Brien should apply: " '[W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.' "[24] The question, then, in Judge Randolph's opinion was whether the government had a "sufficiently important interest" to justify the wiretapping regulations.

Judge Ginsburg, who concurred, would not have applied the O'Brien rule. Instead, he analyzed under Florida Star, but found that McDermott fell outside its protections because he "did not lawfully obtain" the tape. [25] Judge Ginsburg acknowledged that the wiretapping statutes do not prohibit receipt of intercepted information. Nonetheless, he thought that the entire transaction was illegal and that McDermott's knowingly accepting the tape from the eavesdroppers made that illegality apply to him. Judge Ginsburg found that since the Florida Star rule did not apply, the statutes would survive intermediate scrutiny. (480)

Both Judge Randolph and Judge Ginsburg agreed that the wiretapping statutes protected an important government interest in promoting candid private conversations, themselves a form of free speech. (468 - 469) They also analogized the disclosure provisions to laws prohibiting receipt of stolen property. The statutes, therefore, could constitutionally be applied to McDermott's transferring of the tapes to media.

Although the case did not include a media defendant, Judge Randolph seemed to suggest that media defendants might be seen differently because, "sources provide information, but newspapers, not the sources, are the publishers." (472-473) Apparently he would conclude that sources may be engaged in conduct when they transfer information, but media are engaged in speech when they publish or broadcast it.

Dissenting, Judge Sentelle would have applied the Florida Star rule. (481-483) Judge Sentelle found the attempted distinction between sources and publishers unsupportable. That "creates a hierarchy of First Amendment protection for a publishing aristocracy nowhere suggested in the Amendment, its history or the cases applying it," the judge wrote. "[T]he Framers' use of the expression 'the press' does not connote a protected entity, but rather a protected activity." (484)

Judge Sentelle also criticized the majority's focus on conduct, arguing that the goal of the wiretapping statutes is to control the flow of intercepted information, not the transfer of audiotapes. Judge Sentelle recognized that Florida Star did not precisely address disclosures by those who were aware of a defect in the chain of acquisition of information. Nonetheless, the judge concluded that that the wiretapping statutes failed to meet the "narrow tailoring" requirement since they could eventually be applied to media disclosures. (484)

For media, then, the Boehner decision might be described as a form of mystery meat. We can only guess at what the ingredients of an opinion would be if the court were dealing with media defendants. It is quite likely, though, that the result would be unpalatable since the distinction between publishers and sources is fairly bizarre in a world in which the Internet lets anyone be a publisher.[26] Such a distinction also appears to put release on information at a press conference on a different footing from transfer directly to a reporter or editor.

## In the Third Circuit

The Third Circuit case, Bartnicki v. Vopper, was decided several months after Boehner. According to the facts before the court, the cellular phone conversation that led to the Bartnicki case occurred during a union dispute in the Wyoming Valley West School District in Pennsylvania in 1993.[27] Gloria Bartnicki was the chief negotiator for the teachers' union in a “contentious” contract dispute with the District. Anthony F. Kane was president of the local union. One day in May of that year Bartnicki used her cell phone to speak to Kane about the amount of a proposed raise. According to the facts reported, during the conversation, Kane said:

> If they're not going to move for three percent, we're gonna have to go to their, their homes ... to blow off their front porches, we'll have to do some work on some of those guys... (113)

An unknown eavesdropper intercepted and recorded the conversation and left a copy of the recording in the mailbox of Jack Yocum, the president of a citizens' group that opposed the union's agenda. Yocum listened to the tape, recognized the voices on it and gave a copy to Fred Williams (also known as Frederick Vopper) of WILK Radio and Rob Neyhard of WARM Radio. The tape was played on Williams' radio show, which aired on WILK and WGBI-AM, and later on local television stations. A transcript appeared in some newspapers.

Bartnicki and Kane sued Yocum, Williams, WILK and WGBI under the federal wiretapping statute and a similar Pennsylvania law. All the parties moved for summary judgment. The District Court denied these motions, finding that the wiretapping statutes were laws of general applicability. It applied the rule from Cohen v. Cowles Media Co. that the First Amendment is not offended when media are subject to sanctions under generally applicable laws that neither single out the media for special burdens nor purposefully restrict free speech. [28] The District Court concluded that the First Amendment would not bar a judgment against either the intermediary (Yocum) or the media defendants. [29]

On appeal from the denial of summary judgment, the Third Circuit reversed, finding that the wiretapping statutes "may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception." (129)

This conclusion may seem somewhat mundane -- a small leap from the Florida Star rule. The leap, however, was bigger than it looks. In Bartnicki, the path that the court took to its result is more telling than the result itself. In simplest terms, the majority in Bartnicki declined to apply three distinct lines of cases that the parties had urged it to follow and turned instead to a generic content-neutrality analysis. The lines of argument that the court rejected were these:

- the O'Brien rule regarding regulation of speech and related conduct that Judge Randolph in Boehner had found applicable to the intermediary;
- the decision in Cowles Media Co. that the District Court in its own case had followed; and
- most significantly, the Florida Star rule, which the dissenting judge in Boehner would have followed and the lower court in Boehner had applied.

The Third Circuit majority rejected O'Brien and its progeny because it found that those cases were directed primarily at expressive conduct, rather than oral or written communication. The court explained: "If the acts of 'disclosing' and 'publishing' do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct." (120) It made no distinction between an intermediary and the media, thus implicitly rejecting the D.C. Circuit's suggestion that publishers might be treated differently than sources.

The Third Circuit also declined to characterize the wiretapping statutes as acts of general applicability under Cowles Media Co. The court suggested that the disclosure provisions in the laws might be seen as targeting the media, but it pointed out a larger problem with the analysis. The real question, the court said, was whether the penalties on disclosing information could apply to any defendant, whether media or not. (118-119)

Finally, the Third Circuit refused to apply the Florida Star rule. The court cited the limitations on that decision, particularly the Supreme Court's warning that the holding did not decide " ' whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well.' " (117) Rather than taking on privacy law generally or attempting to decide whether the acquisition of the tapes by Yocum or the media was "lawful" or "unlawful," the Third Circuit jettisoned Florida Star.

Instead, the court set about determining whether the wiretapping laws should be classified as content-neutral or content-specific. (121) It found that the government's stated intent in enacting the disclosure penalties was to strengthen the protection against the initial eavesdropping by eliminating the demand for intercepted conversations. (123) On that basis, the court concluded that the statutes were content-neutral and subjected the statutes to intermediate scrutiny -- balancing the government's interest in promoting privacy against the means of achieving that goal, that is, penalizing disclosure of information. (124)

The majority concluded that the First Amendment outweighed the government's interest. It reasoned that the connections between unknown third party interceptors in this case and those who received the taped conversations were "indirect at best." (126) The statute, therefore, was unlikely to work as intended.

The majority also found that the statute restricted more speech than necessary because "[r]eporters often will not know the precise origins of information they receive from witnesses and other sources, nor whether the information stems from a lawful source." (127) Thus, imposing liability in such a circumstance would lead to self-censorship. In addition, the majority analogized to the line of cases leading up to Florida Star, despite the difference in level of scrutiny. In those cases, the majority pointed out, the First Amendment had outweighed concerns about the confidentiality of juvenile criminal proceedings and of judicial disciplinary proceedings as well as the privacy of rape victims. If these important concerns had not outweighed the First Amendment, the court suggested, then neither would the privacy of conversations captured by eavesdroppers, at least in the circumstance of truthful, newsworthy disclosures by those unassociated with the initial interception. (128)

The dissenting judge differed from the majority on two points. First, Judge Pollak distinguished the liability of the intermediary from that of the media. As to the intermediary, in this case, Yocum, Judge Pollak would have accepted the Boehner court's reasoning and would have applied the O'Brien rule regarding "conduct incidental to speech." (131, fn. 3) On the other hand, for the media defendants, he accepted the majority's analysis leading to intermediate scrutiny. He disagreed with the majority, however, on how the balance tipped.

Judge Pollak argued that the link between unknown eavesdroppers and the media is more direct than the majority acknowledged. Disclosure is the ultimate goal of many eavesdroppers, he suggested, and penalties for disclosure are needed to prevent the initial interception. (133) In addition, he said, the majority misconstrued the potential effect of the statute on media, and wrote: "[A] responsible journalist -- whether press or broadcast -- would be unlikely to propose publication of a transcript of an apparently newsworthy conversation without some effort to insure that the conversation in fact took place and to authenticate the identities of the parties to the conversation." (135) Judge Pollak, therefore, would have found that the disclosure sanctions could constitutionally be applied to both sources and media defendants.

For media, then, there is little of comfort in the Bartnicki decision except its outcome. Intermediate scrutiny and its associated balancing test, which both majority and dissent would apply to media, are a long way from Florida Star's requirement of a state interest of the highest order.[30] A balancing of interests could at any point turn in the direction of privacy over publication. This seems particularly true if the importance of the First Amendment is tied to media's supposed need to publish information of unknown origin. At this point, the obvious question is: What happened to Florida Star?

## Evaluating the Rejection of Florida Star

In seeking to understand why the majority in Bartnicki and Judge Randolph in Boehner rejected the Florida Star line of cases, one explanation seems obvious: Because they could. The Supreme Court's repeated emphasis on the narrowness of its holdings invited rejection.

A second explanation is that, by rejecting Florida Star, Judge Randolph and the Bartnicki court managed to avoid the uncomfortable position in which

Judge Ginsburg and the lower court in Boehner found themselves. By applying Florida Star, they were forced to classify Rep. McDermott's acquisition of the taped conversations as either "lawful" and protected or "unlawful" and unprotected. The question of how to treat unlawfulness in the chain of information was specifically left open in the Pentagon Papers case.[31] This task of classification is also complicated by Landmark, in which someone in the chain of information obviously "leaked" to the press in violation of the statute. Landmark seems to suggest that "unlawfulness" in the chain of acquiring information will not necessarily be attributed to the publisher. Thus, there is a constitutionally significant gray area between "unlawfully acquired" and "legally acquired." Judge Ginsburg apparently thought that knowing acceptance of information was a key point, but that focus is also tortured and would likely encourage anonymous donations to the media. These kinds of distinctions push thoughtful analysis past its limit, and it is not surprising that judges would try to avoid them.

Third, it is likely that Florida Star was rejected because it and its predecessors simply are not about the kind of privacy questions that the wiretapping statutes raise. Two of the cases, Landmark and Daily Mail, are not really focused on privacy; they are about government control of particular information associated with administration of justice. That information might be private, but just as easily might not be. Cox and Florida Star itself do involve private information, but it is specific information maintained by the government for law enforcement or criminal prosecution. What the cases share, therefore, is an interest in government control of particular types of information. As the dissenters in Florida Star recognized, the real question there was whether the government could prevent publicity after it had inadvertently disclosed facts that it had intended to keep confidential. [32] These cases might apply if the *government* disclosed information that *it* had acquired by wiretapping, but they do not explore the issues that should be considered when the question involves eavesdropping by one individual on another. That, of course, is the kind of privacy concern addressed by the wiretapping statutes.

Finally, still another explanation for the rejection of Florida Star lies outside the boundaries of case analysis. As the Supreme Court embarked on its consideration of Cox, it remarked on the significance of privacy concerns in general and acknowledged that "the century has experienced a strong tide running in favor of the so-called right of privacy."[33] At the same time it recognized the unsettled state of the law. It was if the Court were holding its breath, waiting to see how far and how fast the privacy tide would rise.

Any number of indicators suggest that the tide is much higher now than it was in the post-Watergate 1970s when the Court decided Cox, Landmark and Daily Mail. Consider, for example, these "disquieting trends" one author recently identified:

- "We Live in a Paparazzi and Tabloid Culture."
- "The Dividing Line Between Public and Private Life Has Evaporated."
- "The Lives of Ordinary People Are Often the Focus of Entertainment and News in Mass Culture."

- "New Technologies Allow our Privacy to be Penetrated in Ways Never Before Possible."
- "We Are Awash in Surveillance."
- "There is a Growing Threat to Privacy On-Line."
- "The Partnership of the Press and Law Enforcement [has increased]."
- "There is Increased Use of Shaming as a Form of Social Control and Criminal Punishment." [34]

In this atmosphere, it is not surprising that the judges in Boehner and Bartnicki might seek something besides the narrow holdings of the Florida Star line of cases. In looking elsewhere, however, the courts turned to cases that had little or nothing to do with privacy or disclosures of private information. Perhaps they would have been better served if they had, instead, considered the body of law and the commentary that have dealt with these questions -- common-law tort privacy.

## A Different Approach

It is widely recognized that the common law divides privacy into four classifications: Intrusion, public disclosure of private facts, false light and appropriation.[35] The Sixth Circuit has concluded that the wiretapping statutes protect the same interests that appear in intrusion and public disclosure cases. That is, the statutes prohibit "the surreptitious interception of private communications in the first instance -- a highly offensive physical intrusion on the victim's private affairs -- and .... circumscrib[e] the dissemination of private information so obtained." [36]

The Bartnicki majority cited the Sixth Circuit opinion to support its conclusion that the state had a significant interest in protecting privacy,[37] but it did not otherwise consult tort privacy law. Perhaps the court feared a dilemma precipitated by the traditional viewpoint that privacy is an individual right. When the right to privacy is matched against the right to free speech, a court may find itself in an unsatisfactory rights versus rights debate. A different perspective on the tort, however, may be more useful.

In his 1989 California Law Review commentary, Robert Post suggests that the common-law torts of intrusion and public disclosure of private facts may be viewed as an aspect of community.[38] Community, he later explained, "is a particular way in which social organization is created, which is by internalizing norms into the identities of persons."[39] Thus, tort privacy protection amounts to recognition of community norms for civilized or decent behavior.

Post begins his analysis by pointing out the central role of the "reasonable person" standard in defining the torts. [40] In both intrusion and public disclosure of private facts, liability exists only when a reasonable person would find the defendant's actions highly offensive. The inquiry is not whether a particular plaintiff subjectively was offended. Instead, it is whether a community standard of acceptable behavior was violated. "The privacy protected by the common law tort cannot be reduced to objective facts like spatial distance or information or observability; it can only be understood by reference to norms of behavior," Post writes. (969)

Intrusion is concerned with spatial violations. It social significance lies in that it recognizes the value of territories, Post says. (972) Sociologists find that observing territories is a means of communicating respect and inviting intimacy, he explains, relying on the work of Erving Goffman. (962, 972) In this analysis, control of space is essential to self-development, and that, reciprocally, is essential to maintaining community.

Thus, Post says, intrusion deserves particular attention from society. The tort transcends the debate over individual rights versus communitarian values, he suggests, because intrusion "presides over precisely those social norms which enable an autonomous self to emerge." (974)

The public disclosure tort, on the other hand, deals with control of information, rather than space. (979) Post emphasizes the importance of viewing the tort initially as an inquiry into whether a particular disclosure was appropriate in the context of the community. This focus is something of a departure from the typical analysis, which might emphasize the content of the information disclosed.[41] Under Post's framing of the tort, the question of whether information is private may turn on the nature of the information, but could just as easily relate to the degree to which the information was previously known and the manner in which it was made known.[42] Post illustrates his point with a Kentucky case in which the defendant put up a large sign telling passersby that the plaintiff owed him a debt but had failed to pay. There is nothing about the content -- existence of a debt -- that in itself makes the disclosure offensive, Post suggests; what would make this disclosure outrageous is the community norm about when and how such information may appropriately be communicated. (979-982)

Even though both the intrusion and public disclosure torts are grounded in similar community norms, there are significant differences between them, Post writes. Intrusion involves a relationship of two -- the intruder and the person whose space was violated. Public disclosure, on the other hand, involves a triad -- the discloser, the person about whom the disclosure was made and the public. (986)

Post sees role of the public in the public disclosure tort as being significant in two ways. First is the publicity requirement. Under the majority rule, he notes, the tort protects against disclosures to large numbers of people, not against disclosures to small groups. (989) At first glance, this focus may seem odd because revelations within intimate relationships presumably would be more personally damaging. The fact that the tort concerns itself with public revelations indicates its true nature -- concern for civility and decency in the exchange of public information, Post says. (990)

Civility, however, is not the community's only interest in public communication. The community also needs public accountability, he says. This need explains the rule that plaintiffs may not recover when the information disclosed is of public concern. Thus, while civility is generally served when private information is kept private, it is not served if individuals use their right to control private information to hide "immoral" acts. (996)

Courts have had great difficulty, Post notes, in defining public concern. (997) Some aspects of it are controlled by the status of the plaintiff, he writes, so that information related to people who enter the public arena, particularly as government officials, is most often of public concern. Other aspects of public concern are determined by the nature of the information itself. (995) Because of the role of the public as the electorate, the public is presumed to need information related to governance. This is given voice, Post says, in the "frequent reiteration by the Supreme Court that 'expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." ' " (999)

The greater problem lies, Post explains, when considering other types of information. It is clear that the common law sees a broad range of information as protected under the public concern standard. In fact, some have suggested that the interpretation is so broad that it swallows the tort. Post himself acknowledges that the definition includes nonpublic information. The line between civility and public need or desire to know is under "enormous social pressure," Post acknowledges. (1007) He cites suggestions that public concern might be determined by local community standards but does not otherwise seem to have an answer to the problem of definition. (1005-1007)

Post's analysis, therefore, concludes with what might be described as a loose end. For the tort as a whole, this may produce continued confusion. But the questions that arise in analyzing wiretapping statutes are more specific, and here Post's approach provides a number of insights.

### The Wiretapping Statutes and Community

The starting point for considering the role of community in relationship to wiretapping laws is with the eavesdropping itself. The Sixth Circuit was correct in comparing it with intrusion. By means of technology, an eavesdropper physically reaches into the personal space of another person.

Post's discussion explains why this violation is so significant. Electronic eavesdropping interferes with the control of territory that allows the self to develop and, in turn, is the grounding for community. The significance of the community's interest is represented not only in the relatively recent tort of intrusion, but also in the historical protection against trespass. It appears in the axiom " a man's home is his castle" and, as to government action, in Fourth Amendment protection from unreasonable search and seizure. The importance to the community of protecting against intrusion goes a long way toward explaining why courts have difficulty moving away from the act of eavesdropping itself to focus more directly on disclosure.

Consider, for instance, the emphasis in Boehner on the "right" to private speech. "The freedom not to speak publicly, to speak only privately, is violated whenever an illegally intercepted conversation is revealed, and it is violated even if the person who does the revealing is not the person who did the intercepting," the court wrote.[43] This quote, while appealing to a sense of fundamental values, misstates the issues. What makes private speech important is the role of language and control over its use in developing and maintaining a sense of self. This is why the community has an interest in private speech and is disturbed when an eavesdropper compromises an individual's ability to control his or her own words.

This concern exists whether or not the intercepted conversation is revealed to others or is widely disseminated. It appears, in fact, that many eavesdroppers are not motivated by the desire to publicize what they find. The incidents cited at the outset of this paper illustrate that point.[44] While the tabloid photographer who recorded the Cruise-Kidman conversation intended to reveal what he found, the other three eavesdroppers apparently had other goals, none of which would lead to the media. In all of these incidents the community norm regarding control of private speech was violated, and it was violated by the intrusion itself. Disclosure of information, as Post has demonstrated, implicates different community interests. Because the Boehner majority failed to consider the true nature of the community's interest in private speech, it also failed to consider the potential benefit to the community of other types of speech. The court, then, confused issues regarding intrusion with issues regarding disclosure.

Questions involving disclosure are more appropriately analyzed by considering the role of the community in relationship to public disclosures of private information. While the link between intrusion and the actual eavesdropping is obvious, the relationship between the public disclosure tort and information initially gathered by an eavesdropper may be less clear. This is particularly true if we think of the public disclosure tort as protecting against disclosure of particular categories of embarrassing information. In some cases, the contents of an intercepted conversation might be embarrassing and secret; in others, the contents would not be.

As Post has indicated, however, "private" is better understood as any disclosure that would highly offend community norms. In this sense, then, we can see that information gathered by an eavesdropper, regardless of its content, would be private because the community is offended by the circumstances that moved it from one person's control to another's. Thus, courts are appropriately concerned about tainted chains of information. The concern, however, is better understood by looking at the interests of the community than by attempting to classify acquisition of information by those unassociated with the eavesdropping itself as "unlawful" or "lawful."

In the tort of public disclosure, the inquiry does not end with a conclusion that a highly offensive disclosure has occurred. Liability arises only when that disclosure is sufficiently public and the information disclosed is not of public concern. For media disclosures, the level of public dissemination is rarely a question. Thus, media disclosures in wiretapping cases would fit squarely into the tort analysis that focuses on the community interest in public information. Here, the community's concern is not just civility but also public accountability. To paraphrase Post, the community has an interest in keeping private information private, but not when a person uses a zone of privacy in a way that could injure the community.

The Bartnicki case presents just such circumstances. A crucial part of the intercepted conversation in that case involved a public controversy and a suggestion that one side might blow up the porches of people on the other side. The court saw no reason to discount the intent expressed. [45] It would seem that the community interest here would lie more in holding the potential wrongdoer publicly accountable than in assuring that he or she received a full measure of civility. In cases of private conversations concerning wrongdoing, then, the need to protect publication is significant and should not be subject to the balancing of intermediate scrutiny.

Of course, not every case will present a clear prospect of wrongdoing. In those cases, courts will be faced with a more difficult determination of whether information may be categorized as being of public concern. Even Post, as we have seen, had difficulty identifying the boundaries of this analysis. In the case of information derived from eavesdropping, however, the line may be easier to draw than for public disclosures generally. Information derived from eavesdropping is tainted. And, the taint is significant; it relates to a violation that may affect the foundations of community and self. Other potential disclosures of private information do not necessarily involve such considerations. The Bartnicki case demonstrates that there are occasions when, even as to tainted information, the community interest in accountability should protect disclosure. In light of the sociological significance of intrusion, however, we should not expect that this would occur frequently. The question remains: How far, beyond disclosures about potential wrongdoing, does the interest in public accountability extend?

Post argues persuasively that in one context, "of public concern" has been defined. When information pertains to governance, he says, its disclosure is in the public interest. This would seem particularly so when, as in Boehner, the information is clearly related to a topic of current debate. As we have seen in defamation law, there is a great need for the public to know about and comment on the activities of public officials doing public business.[46] This need is so great that even a certain range of false information may be protected. It is difficult to see, therefore, why the community would be offended by truthful disclosures in these instances.

Beyond this point is the danger zone. In defining "of public concern," tort law has gone much further, sometimes including information that is more of public amusement than actual concern. As Post has indicated, the definition of public concern collapses into anything that might be news.[47] Should this broad standard apply to disclosures from a chain of information tainted by electronic eavesdropping? Although existing law could be interpreted to support a broad definition, the better answer would be "no."

One reason for limiting the definition of public concern in the wiretapping context is the community interest in protecting against intrusion. As we have seen, this protection is fundamental. Anything that may degrade the protection is suspect.

A second reason is the changing nature of media. Even the casual observer would recognize that the media of 2000 are not the media of 25 years ago when Cox was decided. Changes in technology and industry organization have had an enormous impact on news.[48] Media are everywhere, in every format. News blurs into entertainment and back. News organizations are often units of conglomerates, some of which have interests largely outside the news industry. Both cable television and the World Wide Web have vastly increased the number of potential news outlets. It is more and more difficult to determine who is a journalist and who is not. Perhaps more importantly, it is more and more difficult to determine what is news and what is not. On any given day, news judgment may owe as much to Internet gossip as to editorial decision-making.

As Professor Bezanson recognized in 1992, the changing face of news has significant implications for the judicial definition of "public concern."[49] In defining what is "of public concern," the common law has tended to defer to the judgment of media.[50] Now, however, traditional news media are less and less likely to be able to set the standard. In this sort of media world, it seems unlikely that courts will continue to rely on them to do so. Bezanson, in fact, suggests that it might be best to let the public disclosure tort die and to turn, instead, to legislation to give individuals control over specific information.[51] Although it is doubtful that such a large body of law would simply fall to the wayside, it is possible that a clearer standard -- a brighter line – would be advisable. This is particularly so for analysis of the disclosure provisions of the wiretapping statutes, which regulate only a small, distinct corner of the privacy domain. In light of the strong community need to guard against intrusion, one line that could be drawn is this: Protect disclosures of wrongdoing and disclosures that are central to governance but do not to protect others. In short, as to the wiretapping statutes, "of public concern" would have a far more limited reach than it does in the public disclosure tort as a whole.

Although this possibility may seem threatening to news media, it should not. We are now in a world of information everywhere, much of it biased or otherwise unreliable. In this world, it is difficult for people to distinguish valuable information from junk. It is also difficult for many to take news, in any form, seriously. A rule that operates to protect the community interest in both private information and public accountability should be welcome. Such a rule would give media a "safe harbor" in many instances. It also might be considered a small step toward preserving public understanding of news as a guardian of public trust.

## Endnotes

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[1] Examples are easily found. In one case a photographer in Los Angeles taped a telephone conversation between actor Tom Cruise and wife Nicole Kidman. See "Tabloid photographer sentenced for tapping celebrity cell phone call," in Associated Press State & Local Wire, 17 May 1999, BC cycle; [Lexis-Nexis Academic online database], accessed 2 March 2000;available from http://web.lexis.nexis.com. In another case, a man in Hudson, New Hampshire entertained guests by inviting them to eavesdrop on nearby callers. See "Lawsuit: Neighbors wrought havoc with intercepted cell phone call," in Associated Press State & Regional Wire, 9 March 1999; [Lexis-Nexis Academic online database], accessed 9 March 2000; available from http://web.lexis.nexis.com. In North Carolina, a police officer took it upon himself, with authorization, to record cell phone conversations to further his investigation of drug dealing. See Kerry Hall, "Former Officer Won't Serve Time in Wiretapping Case," (Greensboro, North Carolina) News & Record, 25 August 1998, p. B1, all editions; [Lexis-Nexis Academic online database], accessed 9 March 2000; available from http://web.lexis.nexis.com. And, in still another case, a man in Virginia got into a public fight after obtaining cell phone conversations apparently related to an extramarital affair. See Michael Hemphill, "Controversial Giles County Supervisor Says He'll Resign," Roanoke (Virginia) Times & World News, 13 August 1998, p. B1, New River Valley Edition; [Lexis-Nexis Academic online database], accessed 9 March 2000; available from http://web.lexis.nexis.com.

[2] 18 U.S.C. § 2511(a); Boehner v. McDermott, 191 F.3d 463, 468 fn. 6 (1999).

[3] See "Tabloid photographer," endnote 1; Boehner, 465.

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[4] 18 U.S.C. 2511(c).

[5] Boehner, 468 fn. 6; For the sake of simplicity, this paper will refer to the federal and state wiretapping laws generically as the wiretapping statutes.

[6] Petition for writ of certiorari was granted in Bartnicki v. Vopper, ___ S. Ct. ___, 2000 WL 462941, 68 USLW 3685 (U.S. June 26, 2000) (No. 99-1687) and U.S. v. Vopper, 2000 WL 558119, 68 USLW 3698 (U.S. June 26, 2000) (No. 99-1728). Petition for writ of certiorari was also filed in the Boehner case. See 68 USLW 3686 (April 25, 2000) (No. 99-1709).

[7] Bartnicki, 200 F.3d at 129. Future endnote references will be to the opinion at 200 F.3d 109.

[8] Boehner, 478.

[9] Compare Peavy v. New Times, Inc., 976 F.Supp. 532 (1997) with Natoli v. Sullivan, 606 N.Y.S.2d 504 (1993).

[10] See Rex S. Heinke and Seth M.M. Stodder, Punishing Truthful, Newsworthy Disclosures: The Unconstitutional Application of the Federal Wiretap Statute, 19 Loy LA L J 279 (1999).

[11] 420 U.S. 469 (1975)

[12] Samuel Warren and Louis Brandeis, The Right to Privacy, 4 Harv L Rev 193 (1890).

[13] Cox, 495.

[14] 435 U.S. 469 (1978).

[15] 443 U.S. 97 (1979); see also Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (press cannot later be barred from printing information acquired at earlier open juvenile court proceeding). This case is sometimes also cited in the Cox line of cases.

[16] Davis v. Alaska, 415 U.S. 308 (1974).

[17] Smith, 104-105.

[18] 491 U.S. 524 (1989).

[19] Boehner, 463 fn. 1 (on request for dismissal and appeal from that decision, allegations of complaint are treated as if true for purposes of analysis).

[20] Boehner sued under both the federal statute and a similar Florida statute.

[21] Florida Star, 533.

[22] 1999 U.S. Dist. LEXIS 11509, [*12].

[23] Boehner, 478.

[24] 391 U.S. 367, 376 (upholding statute prohibiting the burning of draft cards).

[25] Boehner, 479.

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[26] But see New York Times Co. v. United States, 403 U.S. 713, 722 (1971), Justices Douglas and Black, concurring (Espionage Act intends to make a distinction between communicating information and publishing it).

[27] Bartnicki, 113.

[28] 501 U.S. 663 (1991) (promissory estoppel law may be applied if journalist breaks promise to keep the name of source confidential).

[29] Bartnicki, 118.

[30] See Andrew P. Napolitano, Whatever Happened to Freedom of Speech? A Defense of "State Interest of the Highest Order" As a Unifying Standard for Erratic First Amendment Jurisprudence," 29 Seton Hall L Rev 1197 (1999) (discussing difference between this standard and other levels of scrutiny).

[31] Florida Star, 535 fn. 8, citing New York Times Co.; see also Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969) (refusing to apply tort law to sanction receipt of information removed from senator's files).

[32] Florida Star, 551.

[33] Cox, 488.

[34] Rodney A. Smolla, Symposium: Privacy and the Law: Panel I, The Media's Intrusion on Privacy, 67 Geo Wash L Rev 1097, 1098 (1999).

[35] See, e.g., Kent R. Middleton, Robert Trager and Bill F. Chamberlin, The Law of Public Communication 5th Ed. (New York: Longman 2000), 160-204.

[36] Fultz v. Gilliam, 942 F.2d 396, 401 (6th Cir. (Tenn.) 1991) (considering statute of limitations problems).

[37] Bartnicki, 122.

[38] Robert C. Post, The Social Foundations of Privacy: Community and Self in the Common Law Tort, 77 Calif L Rev 957 (1989).

[39] Robert C. Post, Symposium: Free Speech and Community: Community and the First Amendment, 29 Ariz St L J 473, 476 (1997).

[40] Post, Social Foundations, 959.

[41] See, e.g., Robert D. Sack, Sack on Defamation: Libel, Slander and Related Problems 3d Ed., (New York: Practicing Law Institute 1999), § 12.4.5.2.2.

[42] Post, Social Foundations, 982-984.

[43] Boehner, 469.

[44] See endnote 1.

[45] Bartnicki, 127.

[46] See New York Times v. Sullivan, 376 U.S. 254 (1964).

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[47] Post, Social Foundations, 1006-1007.

[48] See David Croteau and William Hoynes, Media/Society: Industries, Images and Audiences 2d Ed., (Thousand Oaks, CA: Pine Forge Press 2000), 3-154.

[49] Randall P. Bezanson, The Right to Privacy Revisited: News and Social Change, 1890-1990, 80 Calif L Rev 1133 (1992).

[50] Post, Social Foundations, 1006-1007.

[51] Bezanson, 1171-1174.